United States Court of Appeals
For the First Circuit

No. 21-1032

AMY COHEN ET AL., individually and on behalf of all others similarly situated,

Plaintiffs, Appellees,

v.

BROWN UNIVERSITY ET AL.,

Defendants, Appellees,

ABIGAIL WALSH; LAUREN LAZARO; ROSE DOMONOSKE; MEI LI COSTA; ELLA POLEY; ALYSSA GARDNER; LAUREN MCKEOWN; ALLISON LOWE; TINA PAOLILLO; EVA DURANDEAU; MADELINE STOCKFISH; SONJA BJORNSON,

Objectors, Appellants.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. John J. McConnell, Jr., U.S. District Judge]
[Hon. Patricia Sullivan, U.S. Magistrate Judge]

Before

Howard, Chief Judge, Selya and Lynch, Circuit Judges.

Robert J. Bonsignore, with whom Lisa Sleboda, Bonsignore Trial Lawyers, PLLC, Anthony J. Gianfrancesco, and Gianfrancesco & Friedmann LLP were on brief, for objectors.

Lynette Labinger, with whom Arthur H. Bryant, Bailey & Glasser, LLP, Lori Bullock, and Newkirk Zwagerman were on brief, for plaintiffs.

Marcella Coburn, with whom Roberta A. Kaplan, Gabrielle E. Tenzer, Kaplan Hecker & Fink LLP, Robert Clark Corrente, and Whelan Corrente & Flanders LLP were on brief, for defendants.

October 27, 2021

SELYA, Circuit Judge. This landmark Title IX case does not come to us as a stranger. Shortly after a group of women student-athletes brought suit against Brown University (Brown) claiming gender discrimination with respect to the funding and operation of a panoply of varsity athletic programs, the district court certified a class and entered a preliminary injunction sought by the plaintiffs. See Cohen v. Brown Univ. (Cohen I), 809 F. Supp. 978, 980, 1001 (D.R.I. 1992).

We upheld the issuance of the preliminary injunction, concluding (among other things) that the plaintiffs were likely to succeed in their suit. See Cohen v. Brown Univ. (Cohen II), 991 F.2d 888, 904, 907 (1st Cir. 1993). After a bench trial, the district court found that

Brown had violated Title IX by failing effectively to accommodate the interests and abilities of women athletes. See Cohen v. Brown Univ. (Cohen III), 879 F. Supp. 185, 200, 211-14 (D.R.I. 1995).

When the district court rejected Brown's proposed compliance plan, Brown again appealed. We affirmed the district court's judgment in part, reversed it in part, and remanded for further proceedings. See Cohen v. Brown Univ. (Cohen IV), 101 F.3d 155, 162, 188 (1st Cir. 1996).The parties subsequently consummated a settlement. That settlement, given bite by the imprimatur of the district court, has remained in effect for over two decades.

As time went by and circumstances changed, Brown unilaterally decided in 2020 to eliminate certain varsity sports and to upgrade sailing to varsity status (open to men and women). With this reshuffling on the table and renewed litigation in the offing, the parties opted to revisit all of the matters embodied in the court-approved settlement. Following protracted negotiations, ably coordinated by a magistrate judge, Brown and the class achieved a meeting of the minds and jointly moved for approval of a revised agreement (the Amended Settlement Agreement). But not all class members were pleased by the terms of the proposed amended settlement: some of them objected (the Objectors), complaining that the named plaintiffs were not adequate representatives of the class and that the settlement's terms gave parts of the class a raw deal. The district court held a fairness hearing and overruled the objections. The court, ruling from the bench,

found that the proposed amended settlement was fair, reasonable, and adequate. Dismayed by the district court's approval of the Amended Settlement Agreement, the Objectors appealed.

We are mindful that – especially in institutional reform cases – class-wide relief must be adapted to reflect changing times and circumstances. One such circumstance, relevant here, is that the prophylaxis of Title IX has matured since the class-wide settlement was originally put in place. Another relevant circumstance is that, over a span of many years, Brown has demonstrated an increased awareness of and sensitivity to the constraints that Title IX imposes upon a university's varsity athletic programs. Last – but surely not least – striking the Title IX balance in a case of this kind is more an art, informed by experience, than a science. District courts are on the front lines when assessing class-wide relief and considerable deference is due to the exercise of their informed discretion. After careful consideration of the genesis of the litigation, its history and objectives, and Brown's evolving response to the demands of Title IX, we conclude that the district court's approval of the Amended Settlement Agreement was within the wide encincture of its discretion. Consequently, we affirm the judgment below.

I. BACKGROUND

We briefly rehearse the relevant facts and travel of the case starting with its historical roots and proceeding to its present-day posture.

A. The 1990s: Skirmishes and Settlement.

In 1991, Brown downgraded four athletic teams – women's volleyball and gymnastics, men's golf and water polo – from full varsity status to intercollegiate club status. See Cohen II, 991 F.2d at 892. The next year, several members of the women's volleyball and gymnastics teams sued Brown under Title IX and its implementing regulations, charging that – with respect to its athletic programs – Brown did not "effectively accommodate the interests and abilities of members of both sexes." Id. at 892-96 (quoting 34 C.F.R. § 106.41(c)(1)). The district court certified a class of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown." Id. at 893. The designated class representatives were women student-athletes then-enrolled at Brown. Those representatives – all of whom have long since graduated – remain the class representatives today, save for two who dropped out along the way. So, too, the original class counsel remain aboard.

In late 1992, the district court issued a preliminary injunction in favor of the plaintiffs. See Cohen I, 809 F. Supp. at 1001. Forced to "invade terra incognita" at an untrammeled "crossroads of the law," we affirmed. Cohen II, 991 F.2d at 893, 907. The district court subsequently held a trial on the merits. In the midst of trial, the parties reached a partial settlement regarding the disparate-funding portion of the plaintiffs' claims, and the district court approved that

settlement. See Cohen III, 879 F. Supp. at 192-93. What remained were the claims of disparate participation opportunities. See id. At the end of the trial, the district court ruled that Brown had violated Title IX in that respect and ordered it to submit a compliance plan. See id. at 213-14.

Brown proposed to cut some men's varsity teams as a means of leveling the playing field between the sexes, but the district court rejected this proposal and instead ordered Brown to elevate and maintain specific women's teams. See Cohen IV, 101 F.3d at 162, 187. A divided panel of this court affirmed the district court's ruling that Brown was in violation of Title IX. See id. at 162. The panel majority also agreed with the district court that Brown's proposal was not "a good faith effort." Id. at 187. We nonetheless concluded "that Brown's proposal to cut men's teams [was] a permissible means of effectuating compliance with the statute" and, thus, "the district court was wrong to reject out-of-hand Brown's . . . plan." Id. We remanded to give Brown another chance to come up with an acceptable compliance plan. See id. at 188.

In June of 1998, the parties reached a comprehensive settlement, dubbed the Joint Agreement, which the district court approved. In major part, that agreement locked in a proportional representation scheme: the percentage of each gender's athletes at Brown must lie within 3.5% or 2.25% (depending on the circumstances) of each gender's respective undergraduate campus presence. The Joint Agreement required Brown to submit a compliance report annually to class

counsel. It also created a mechanism for the parties to exchange objections and replies concerning Brown's compliance or the lack thereof.

By its terms, the Joint Agreement was "indefinite in duration" and provided that the district court would "retain jurisdiction concerning interpretation, enforcement and compliance" with its stipulations.

B. The Latest Skirmish and Settlement.

For twenty-two years, Brown's athletes played on the turf of this Joint Agreement. Brown dutifully submitted its annual report each August. On the few occasions when issues surfaced, the parties resolved them without judicial intervention.

In May of 2020, a new era dawned. Christina Paxson, who had become Brown's president well after the fact and who was a defendant in the case by virtue of her office, announced the "Excellence in Brown Athletics Initiative" (the Initiative). With a view toward making Brown's programs more competitive overall, the Initiative purposed to downgrade five women's teams and six men's teams from varsity status to club status,[1] while elevating the women's sailing and co-ed sailing teams to varsity status. The planned hit to the men's track, field, and cross country teams, in particular, provoked a fierce backlash. In a June 6 public

[1] The teams that the Initiative placed on the chopping block were men's and women's fencing, men's and women's golf, women's skiing, men's and women's squash, women's equestrian, men's track, men's field, and men's cross country.

statement, President Paxson contended that simply restoring men's track, field, and cross country would place Brown in violation of the Joint Agreement. Nevertheless, Brown bowed to the pressure three days later: President Paxson announced that Brown would not downgrade the men's track, field, and cross country teams. It would achieve compliance with the Joint Agreement "for the time being" by making other (unspecified) programmatic "modifications."

The class representatives were not inclined to acquiesce. Through class counsel, they asserted that Brown was violating the Joint Agreement and moved for enforcement of the decades-old judgment and for emergency relief. Expedited litigation ensued. Each side engaged in document discovery, exchanged expert reports, deposed witnesses, and filed briefs.[2]

In September of 2020, the parties entered into mediation under the auspices of a magistrate judge – a process that class counsel later described as "intense shuttle diplomacy, spanning nearly two dozen conferences." The mediation resulted in a negotiated settlement. The Amended Settlement Agreement, styled as a modification of the Joint Agreement, expires by its

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[2] In one email exchange produced in discovery, Brown's chancellor suggested to President Paxson that they might "go after the Consent Decree once and for all," wondering if they could "channel all this emotion away from anger at Brown to anger at the court and kill this pestilential thing" – a reference to the Joint Agreement. President Paxson praised the idea, adding that "[t]his might be the perfect moment to petition the court to get us out of this agreement."

terms on August 31, 2024. Until then, Brown must restore two women's teams to varsity status[3] and may not downgrade any women's varsity team. And should Brown elect to make a permitted upgrade of any men's team to varsity status, it must restore an equal number of women's teams plus two to varsity status.[4]

The parties asked the district court to approve the Amended Settlement Agreement and notice was provided to the members of the class. See Fed. R. Civ. P. 23(e)(1)-(2). Twelve members of Brown's varsity women's gymnastics and hockey teams objected to the proposed settlement. They argued, as relevant here, that the named class representatives were inadequate representatives of the class and that the proposed settlement was not "fair, reasonable, and adequate," as required by Federal Rule of Civil Procedure 23(e)(2). The district court held a fairness hearing by videoconference on December 15 and approved the Amended Settlement Agreement. The court singled out for praise the "masterful" work of the magistrate judge and the diligence of both President Paxson and class counsel. In rejecting the Objectors' contentions, the court pointed out that "[t]he number of objectors represents a very small fraction of the class members as a whole,"

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[3] Pursuant to this clause, Brown chose to restore the women's equestrian team and the women's fencing team.

[4] The Amended Settlement Agreement also resolves a more interstitial dispute. Under it, each student-sailor counts only once, even when that sailor competes on multiple sailing squads. The Amended Settlement Agreement, though, does not resolve the larger question of whether the women's and co-ed sailing teams are to be regarded as separate teams.

and this fact "is in and of itself representative of the settlement's reasonableness." This timely appeal followed.

II. ANALYSIS

In this venue, the Objectors advance two principal claims of error. First, they assert that the designated class representatives "did not, and could not," adequately represent the class as a whole. Second, they assert that the district court abused its discretion in determining that the Amended Settlement Agreement was fair, reasonable, and adequate. As class members, the Objectors have standing to pursue these claims of error. See Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (holding that nonnamed class members who objected at fairness hearing may appeal without intervening).

We start with some general principles. A district court may approve a class-action settlement only if that settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Before 2018, the case law refracted this standard into a "laundry list[] of factors." Bezdek v. Vibram USA, Inc., 809 F.3d 78, 82 (1st Cir. 2015) (quoting Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 44 (1st Cir. 2009)). Sensing a need "to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal," Congress revised the rule to highlight four factors. Fed. R. Civ. P. 23(e)(2) advisory

committee's note to 2018 amendments.[5] Rule 23(e)(2) now requires that the district court "consider[] whether":

> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate . . . and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). The Advisory Committee explained that the first two factors are "procedural" in nature, "looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Id. advisory committee's note to 2018 amendments. As a corollary, the latter two factors guide "a 'substantive' review of the terms of the proposed settlement." Id.

We have observed that "the ultimate decision by the [district court] involves balancing the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement." Nat'l Ass'n of Chain Drug Stores, 582 F.3d at 44. Consequently, approval or rejection of a

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[5] Importantly, the Advisory Committee noted that the amendment was not intended to "displace any factor" previously in use. Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendments.

class-action settlement is entrusted to the district court's informed discretion. See Robinson v. Nat'l Student Clearinghouse, 14 F.4th 56, 59 (1st Cir. 2021).We review the district court's determination for abuse of that discretion – a multifaceted standard under which we scrutinize embedded legal issues de novo and factual findings for clear error. See id.

With this backdrop in place, we turn to the specifics of the Objectors' appeal.

A. Threshold Issues.

At the outset, we must iron out two procedural wrinkles. Both wrinkles relate to class counsel's entreaty that we decline to entertain the Objectors' plaints as to adequacy of representation. Class counsel first submits that this issue was not squarely presented below and, thus, was not preserved for appeal. See Teamsters Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992) ("If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal."). Second, class counsel submits that we are precluded from revisiting the adequacy of class representation where, as here, no motion for either decertification or modification of the class was made below.

The first of these two procedural barriers is easily scaled. We agree that the Objectors did not make this claim with lapidary precision. But the essence of the

argument was advanced, and the rule that only arguments "actually articulated in the trial court" are preserved for appellate review reflects the insight that "[o]verburdened trial judges cannot be expected to be mind readers." McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991). This does not mean, however, that we should assume that trial judges are dense. Here, we have no reason to doubt that the district court grasped the gist of the Objectors' argument. Cf. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1581 (2020) (observing that "a court is not hidebound by the precise arguments of counsel"). The argument was not waived.

We also conclude that the second procedural barrier does not block our consideration of the Objectors' claim. The class representatives, through class counsel, argue that because the class has been certified since 1992, untouched by any motion to decertify or modify the class, the adequacy of class representation remains "the law of the case." In their view, the Objectors may challenge this "law of the case" only by seeking decertification or modification of the class, which they failed to do.

For this proposition, the class representatives rely primarily on our decision in Voss v. Rolland, 592 F.3d 242 (1st Cir. 2010). That reliance is mislaid. In Voss, we declined to consider objectors' arguments regarding adequacy of representation in the class-action settlement context. See id. at 251. We explained that the class had been certified for a decade before the objectors moved for decertification and that their failure to appeal the district court's denial of that motion

"doom[ed] their attempt to raise the class certification issue before us." Id.

Our refusal to engage with the Voss objectors' class-certification arguments rested primarily on their packaging of those arguments in the district court as a motion for decertification, the denial of which they failed to appeal. See id.[6] So viewed, the Voss decision reflects a conventional application of the longstanding rule that the court of appeals lacks jurisdiction over claims lying outside "a properly targeted notice of appeal or the functional equivalent thereof." Kotler v. Am. Tobacco Co., 981 F.2d 7, 12 (1st Cir. 1992). Here, in contrast, the Objectors offered their adequacy-of-representation objection to the district court in the same guise as it comes to us now and – crucially – timely appealed the district court's adverse order.

In sum, we cannot fault the Objectors for challenging the settlement on a ground expressly contemplated by Rule 23 and then timely appealing the district court's rejection of that challenge. We hold, therefore, that the Objectors were not obliged to channel their class-representation grievances into a motion for decertification or modification of the class. See, e.g., In re

[6] Indeed, the district court approved the Voss settlement months before ruling on the objectors' motion to decertify the class, and its opinion approving the settlement did not address the adequacy of representation. See Rolland v. Patrick, 562 F. Supp. 2d 176 (D. Mass. 2008); Rolland v. Patrick, No. 98-30208, 2008 WL 4104488 (D. Mass. Aug. 19, 2008).

Cendant Corp. Litig., 264 F.3d 201, 230-31, 243, 252-53 (3d Cir. 2001).

B. Adequacy of Representation.

Having smoothed out the procedural wrinkles, we press on to the gravamen of the Objectors' claim of error. The Objectors first contend that the named class representatives no longer adequately represent the class. Before grappling with this contention, we summarize the applicable law.

Whether "the class representatives and class counsel have adequately represented the class" is the first factor that courts must consider in evaluating a proposed class-action settlement. Fed. R. Civ. P. 23(e)(2)(A). Because this factor overlaps with other requirements imposed by Rule 23, see 4 William B. Rubenstein, Newberg on Class Actions (Newberg) § 13:49 (5th ed. 2021 Suppl.), we look to case law glossing the stipulation that "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4).

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997). Such conflicts undermine the indispensable "structural assurance of fair and adequate representation for the diverse groups and individuals affected" by the class-action litigation or settlement. Id. at 627. This concern has constitutional underpinnings because "the Due Process

Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

The standard, though, is not "perfect symmetry of interest" among the class. Matamoros v. Starbucks Corp., 699 F.3d 129, 138 (1st Cir. 2012). The perfect is sometimes the enemy of the good, and intra-class conflicts breach Rule 23(a)(4)'s adequacy-of-representation standard only when they "are fundamental to the suit and . . . go to the heart of the litigation." Id. (quoting 1 Newberg § 3:58 (5th ed. 2011)).

In this instance, the Objectors start by complaining that the district court committed "legal error" in "fail[ing] to conduct any analysis at all" regarding the adequacy of representation by the class representatives. They assert that Rule 23(e)(2) required the court to make "specific findings as to the adequacy of the Class Representatives" before approving the settlement. This assertion reads more into Rule 23(e)(2) than its text can bear.

Rule 23(e)(2) instructs the district court to "consider[]" the adequacy of representation by the class representatives. It does not direct the court to make specific findings as to adequacy of representation. Although specific findings are always helpful, they are not obligatory. Here, moreover, there is no basis for assuming that the district court failed to consider this factor, particularly in view of the district court's explicit acknowledgment of the Objectors' protest that

"the class representatives are not valid." Surveying the record as a whole, we are satisfied that the district court considered this factor and implicitly found no reason to question the adequacy of representation by the class representatives. Cf. Paraflon Invs., Ltd. v. Fullbridge, Inc., 960 F.3d 17, 29-30 (1st Cir. 2020) (accepting district court's "implicit finding[s]" following bench trial).

This brings us to the heart of the Objectors' argument: that the named representatives could not and did not adequately represent the class of current and future students because the named representatives – who were members of the class when they were appointed – graduated from Brown in the distant past. In the Objectors' view, the "class representatives are no longer members of the class" and "don't have skin in the game." Therefore, the Objectors insist, the class representatives' interests are not "aligned" with those of the class.

Whether the class representatives are disqualified solely by dint of the mootness of their claims is a legal question that we review de novo. See Bezdek, 809 F.3d at 82. To the extent that the Objectors urge us down a path toward a per se rule that alumnae cannot adequately represent a class of current and future students, the Supreme Court's decision in Sosna v. Iowa obstructs that path. 419 U.S. 393 (1975). Challenging the constitutionality of an Iowa law requiring one year of residency in the state to petition for divorce, Carol Sosna represented a class of under-one-year Iowa residents seeking to end their marriages. See id. at

395-97. But by the time her case reached the Supreme Court, her multi-year Iowa residency was established and, in any event, she had managed to get divorced in New York. See id. at 398-99. Notwithstanding that Sosna's own claim was moot, the Court held that the class action was not moot because "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by" the named class representative (Sosna), and the controversy remained "very much alive for the class of persons she ha[d] been certified to represent." Id. at 399-401.

The Sosna Court clarified that, wholly apart from mootness, an obligation remained under Rule 23(a)(4) to ensure "that the named representative will adequately protect the interests of the class." Id. at 403. The Court proceeded to hold that Sosna was still an adequate representative both because it was "unlikely" that her interests would conflict with those of the class and because she had performed her representational duties "competently." Id. The decision in Sosna makes it plain that – at least sometimes – a plaintiff whose own claims are moot may adequately represent a class. See U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 405 (1980) ("In Sosna v. Iowa it was recognized that a named plaintiff whose claim on the merits expires after class certification may still adequately represent the class."). There is no per se rule.

Several of our sister circuits have concluded that class members whose claims are no longer live may

adequately represent the class on a going-forward basis.[7] See, e.g., J.D. v. Azar, 925 F.3d 1291, 1313 (D.C. Cir. 2019) (per curiam) ("Mootness alone . . . does not establish [the named plaintiffs'] inadequacy as representatives."); Binta B. ex rel. S.A. v. Gordon, 710 F.3d 608, 619 (6th Cir. 2013) (explaining that class representative with moot claim is adequate "at least until such time that there is a determination that the representative is no longer adequate"); Reed v. Bowen, 849 F.2d 1307, 1312 (10th Cir. 1988) (holding that district court "determine[s] whether mooted named plaintiffs will remain adequate class representatives"); Harris v. Peabody, 611 F.2d 543, 544 (5th Cir. 1980) (per curiam) ("Whether [plaintiff with moot claims] may continue to represent a class depends upon the facts of the given case."); Ahrens v. Thomas, 570 F.2d 286, 288-89 (8th Cir. 1978) (holding that plaintiff, no longer a pretrial detainee, adequately represented class of "all present and future pretrial detainees" at jail).

We think that this is the proper frame of reference: an inquiring court should not invoke any presumption

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[7] Two courts of appeals look with more jaundiced eyes upon class representatives whose own claims have become moot. See Irvin v. Harris, 944 F.3d 63, 71 (2d Cir. 2019) (holding that class of inmates at correctional institution was not adequately represented by named plaintiffs who were "no longer . . . inmates and have not continued to pursue the litigation"); Culver v. City of Milwaukee, 277 F.3d 908, 912 (7th Cir. 2002) (stating that class representatives whose own claims have been rendered moot are "presumptively inadequate"). These cases are distinguishable on their facts: in each of them, the named plaintiffs – unlike in this case – had failed to pursue class claims diligently. See Irvin, 944 F.3d at 71; Culver, 277 F.3d at 912.

against allowing a plaintiff whose own claim has become moot to continue in place as a class representative but, rather, should consider the adequacy-of-representation issue on the facts of the particular case. That inquiry proceeds along the lines suggested by Sosna: we must ask whether the representatives' interests meaningfully conflict with those of the class and whether the representatives are competent champions of the cause. See Sosna, 419 U.S. at 403; see also 1 Newberg § 3:54 (5th ed. 2011) (discussing these "two component inquiries" and suggesting that "the first is by far the more important").[8]

With this framework in place, we now probe the adequacy of representation on the facts at hand and review that aspect of the district court's ruling for abuse of discretion. See Matamoros, 699 F.2d at 138.

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[8] Just as we reject a per se rule against individuals with moot claims representing a class, we reject the Objectors' related argument that the class representatives are barred from that role because they are no longer members of the class. The same was said of the former Mrs. Sosna, see Sosna, 419 U.S. at 417 (White, J., dissenting), but the Supreme Court gave this argument short shrift. The Court saw no problem with the former Mrs. Sosna – by then, a divorcée and two-year Iowa resident – adequately representing the class of discontented spouses with "less than one year" of Iowa residency "who desire" a divorce. Id. at 397, 403 (majority opinion). The Objectors do not dispute that the named representatives were "member[s] of the class . . . at the time the class action [was] certified." Id. at 403. Given that membership, we need not decide whether they formally remain part of the class today. Under Sosna, these representatives – as long as they are competent champions of the class's cause and their interests do not conflict with those of the class members – may continue to represent the class.

On this score, the Objectors first argue that representation by the designated class representatives was inadequate because those representatives did not participate in negotiating the Amended Settlement Agreement. Even assuming that such participation is necessary – a matter on which we take no view – class counsel told the district court, in advance of the fairness hearing, that the "representatives . . . were fully informed about, and provided input into, the prosecution and proposed settlement of the case." Nothing in the record contradicts this statement, and the Objectors did not dispute it below. The district court was, therefore, free to credit class counsel's statement. The Objectors' lack-of-participation claim fails.

More broadly, the Objectors argue that the named class representatives were incapable of adequately representing the class because none of them were currently participating (or eligible to participate, for that matter) in Brown's athletic programs. As the Objectors put it, none of the class representatives had "skin in the game."

In one sense, this argument is merely a variation on an already discredited theme. The bald fact that the class representatives' own claims have been rendered moot by the passage of time does not render them unfit to represent the class. Rather, the determination as to their adequacy remains fact-specific and context-specific. Here, there is every reason to believe that the named class representatives are competent champions of the class's cause. They were the ones who first turned a spotlight on Brown's insensitivity to gender

equality in structuring its athletic programs; they have been combatants in this war ever since; they participated in bringing about an armistice in the form of the Joint Agreement; and they have been protagonists in the latest round of hostilities. Finally, no one – not even the Objectors – has suggested that the class representatives have been lackadaisical in the performance of their duties.

It may not be an exaggeration to say that, typically, named representatives play only a "nominal" role because class actions are "in fact entirely managed by class counsel." Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1080 (7th Cir. 2013) (Posner, J.). But even a nominal plaintiff may add experience and continuity to the class-representation equation. For example, several of the named plaintiffs here testified before a congressional subcommittee in 1993 and, last year, wrote an open letter to Brown in the local paper.[9] A class is well-served by representatives who are conscious of the case's history and their adversary's past behavior, and who can tell the class's story with a panoramic arc. The district court was entitled to give weight to these values in deeming these representatives adequate.

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[9] See Intercollegiate Sports (Part 2): Hearings Before the Subcomm. on Com., Consumer Protec. & Competitiveness of the H. Comm. on Energy & Com., 103d Cong. 9-20 (1994); Amy Cohen & Karen Hurley, Title IX at Brown: A Missed Opportunity for True Excellence, Providence J. (Sept. 25, 2020, 2:24 PM), https://www.providencejournal.com/story/opinion/2020/09/25/opinioncohen-and-hurley-title-ix-at-brown-missed-opportunityfor-true-excellence/114138498/.

The Objectors have not shown that the interests of the named class representatives actually conflict with the interests of members of the class. But the Objectors pose a separate problem: they contend that any representation of the class must be inadequate due to conflicting interests among current students on different teams. This contention draws its essence from the proposition that adequate representation is impossible in cases in which, "[i]n significant respects, the interests of those within the single class are not aligned." Amchem, 521 U.S. at 626. Building on this foundation, the Objectors suggest that "the class members whose sports were eliminated clearly would possess an incentive to give up rights and benefits secured by the Joint Agreement in order to gain reinstatement of their sport," whereas other student-athletes (such as the Objectors, who are gymnasts and hockey players whose varsity teams were spared by Brown) would have an incentivize "to retain th[e] Agreement as-is." This misalignment, the Objectors say, constitutes an irredeemable conflict.

In the arena of Title IX athletics litigation, courts have taken divergent views on the issue of intra-class conflicts among collegiate sports teams. Several courts, sparked by the Second Circuit's decision in Boucher v. Syracuse University, 164 F.3d 113 (2d Cir. 1999), have required subclassing to isolate the conflict arising from the recognition that a school's Title IX "compliance might well be achieved by the elevation of one sport and not the other." Id. at 116-17, 119; see Robb v. Lock Haven Univ. of Penn., No. 17-00964, 2019 WL 2005636,

at *12-13 (M.D. Pa. May 7, 2019); S.G. ex rel. Gordon v. Jordan Sch. Dist., No. 1700677, 2018 WL 4899098, at *2 (D. Utah Oct. 9, 2018); Miller v. Univ. of Cincinnati, 241 F.R.D. 285, 290 (S.D. Ohio 2006). Other courts, though, have not envisioned this potential conflict among different sports teams as necessarily disrupting the unity of the class (particularly where the conflict is speculative). See A.B. ex rel. C.B. v. Haw. State Dep't of Educ., 334 F.R.D. 600, 611 (D. Haw. 2019); Portz v. St. Cloud State Univ., 297 F. Supp. 3d 929, 946-47 (D. Minn. 2018); Foltz v. Del. State Univ., 269 F.R.D. 419, 423-24 (D. Del. 2010).

In approaching this question, we do not write on an entirely pristine page. Previous opinions in this case (both from this court and from the district court) have proceeded on the implicit understanding that subclassing is not essential. This is the first time, however, that any party has suggested dividing the class into subclasses, and we regard the issue as open in this circuit.

The determinative factor, of course, is whether the conflict among members of Brown's various women's sports teams is "so substantial as to overbalance the common interests of the class members as a whole."[10]

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[10] Consistent with the Objectors' argument, we consider only the purported intra-class conflict among current students. We do not address the possible use of subclassing as a means of separating current students from future students. Inasmuch as the Objectors have not pursued any such argument on appeal, we deem it waived. See Wills v. Brown Univ., 184 F.3d 20, 27 (1st Cir. 1999); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

Matamoros, 699 F.3d at 138. Seeking to clear this hurdle, the Objectors note that women students who were members of any of the five varsity teams downgraded by Brown in 2020 found themselves in a more problematic situation than those who were members of teams that were spared. On this basis, their objection may be framed as analogous to the problem in Amchem. The Amchem Court held that a single class was improper because the interest of the "currently injured" plaintiffs (that is, those already suffering from asbestos-related disease) sharply conflicted with that of the "exposure-only plaintiffs" (that is, those who were not yet symptomatic) who wanted to "ensur[e] an ample, inflation-protected fund for the future." Amchem, 521 U.S. at 626. The proposed analogy is that the women students on the five downgraded teams wanted immediate reinstatement, while their peers may have been more inclined to bargain for longer-term concessions.

On further examination, though, the proposed analogy collapses. The single class certified in Amchem included both a group focused on "current payouts" and a group focused on "distant recoveries." Id. at 610-11. That duality created an unacceptable risk that one group would trade away the other group's most cherished benefit. See id.; see also Samuel Issacharoff & Richard Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1680 (2008) ("The intraclass conflict in Amchem mattered . . . because . any realistic peace would turn on the making of tradeoffs across critical dividing lines within the proposed plaintiff class.").

The lesson of Amchem is that intra-class conflict is unacceptable when it presents an actual and substantial risk of skewing available relief in favor of some subset of class members. See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223, 232-33 (2d Cir. 2016); In re Motor Vehicles Canadian Export Antitrust Litig., 269 F.R.D. 80, 91 (D. Me. 2010). No such risk is apparent here. The record simply does not suggest any reason to believe that the class representatives' negotiations were apt to be skewed in favor of reinstating certain teams by jettisoning others. Consequently, there is no reason to regard the interests of members of the various teams as so antagonistic as to demand subclassing.

In point of fact, the opposite is true. The interests of all women athletes presently at Brown are in large part aligned. Under the Joint Agreement, every varsity team, regardless of gender, played at Brown's pleasure, knowing that "Title IX does not require institutions to fund any particular number or type of athletic opportunities." Cohen II, 991 F.2d at 906; see Cohen IV, 101 F.3d at 187-88 (explaining that "[o]ur respect for academic freedom . . . counsels that we give universities as much freedom as possible"). When Brown pulled the plug on certain teams in 2020, women students on the unaffected teams may have breathed a sigh of relief. At the same time, however, they must have been keenly aware that nothing prevented Brown from pulling the plug on their teams as well. This precarity was accentuated by Brown's abrupt flip-flop with respect to the men's track, field, and cross country teams. Under the

terms of the Joint Agreement, Brown giveth and Brown taketh away.

It follows inexorably, as night follows day, that a significant interest common to all student-athletes was the imposition of some meaningful limit on Brown's discretion to strip teams of varsity status. Although this interest may have been less important to students on teams already downgraded, even those students' teams could be elevated in due course. They would then benefit from negotiated safeguards. Adequacy of representation is not hollowed out where, as here, the interests are generally shared by the members of the class, albeit "differently weighted." Gooch v. Life Invs. Ins. Co. of Am., 672 F.3d 402, 429 (6th Cir. 2012); see J.D., 925 F.3d at 1314 ("[T]he presence of uninterested individuals in a class does not compel a finding of inadequacy."). We find, therefore, that the specter of intra-class conflict raised by the Objectors is purely speculative and that no intra-class conflict between sports teams placed the adequacy of representation out of bounds.[11]

That ends this aspect of the matter. We conclude that the district court considered the quality of the

[11] This conclusion is also confirmed by the terms of the Amended Settlement Agreement, which – as discussed infra – do not evince prejudice toward particular teams. Cf. In re Payment Card, 827 F.3d at 236 ("Like the Supreme Court in Amchem, we 'examine a settlement's substance for evidence of prejudice to the interests of a subset of plaintiffs' when 'assessing the adequacy of representation.' " (quoting In re Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 252 (2d Cir. 2011))).

representation afforded by the class representatives and supportably found that representation to be adequate.

C. The Substance of the Amended Settlement.

This brings us to the Objectors' second claim of error. The Objectors decry the substance of the settlement as not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

At the fairness hearing, the district court acknowledged the parties' extensive discovery, spanning "tens of thousands of pages of documents," "six depositions," and "five separate expert reports." The Objectors conceded that "discovery in this particular case was amazing." The district court then commented favorably on the "effective and successful arm's length negotiation" facilitated by the magistrate judge.

When – as in this case – "the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable." In re Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 32-33 (1st Cir. 2009); see Robinson, 14 F.4th at 59. A party seeking to overcome such a presumption faces a steep uphill climb. The Objectors cannot scale those heights.

After balancing the pluses and minuses of the proposed settlement as against other possible outcomes (including the uncertain consequences of a trial), see Nat'l Ass'n of Chain Drug Stores, 582 F.3d at 44, the

district court determined that the Objectors had failed to rebut the presumption of reasonableness. The court went on to determine that the Amended Settlement Agreement was not only reasonable but also fair and adequate.

The Objectors' assault on these findings is easily repulsed. Their chief complaint is that the Amended Settlement Agreement will expire in August of 2024, and this end date "forfeits" the protections of the Joint Agreement without commensurate gains for the class. In their view, the class received very little in exchange for its acquiescence to a 2024 expiration date.

The Objectors' plaint comprises more cry than wool. The Amended Settlement Agreement conferred demonstrable benefits. For instance, the class received immediate reinstatement of the women's equestrian and fencing teams. It also received Brown's commitment not to downgrade any other women's varsity teams to club status for the life of the Amended Settlement Agreement. That is hardly nothing, especially in light of Brown's colorable assertions that its shuffling of its athletic programs through the Initiative was in full compliance with the Joint Agreement.

We add, moreover, that the passage of time had eroded the advantages conferred on the class by the Joint Agreement. Specifically, the principal benefit of the Joint Agreement – Brown's willingness to abide by a 2.25% permissible variance in women's athletic opportunities – has arguably been overtaken by developing Title IX case law. Although a 2.25% variance

almost certainly would have passed legal muster in 1998, such a result is less certain today. See, e.g., Portz v. St. Cloud State Univ., 401 F. Supp. 3d 834, 845, 863 (D. Minn. 2019) (finding Title IX violation for years in which women's athletic participation varied 2.5% and 2.9%, respectively, from women's enrollment); Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 111-13 (D. Conn. 2010), aff'd, 691 F.3d 85 (2d Cir. 2012) (concluding that Title IX was violated when 3.62% variance in women's athletic participation was considered along with other factors). Thus, eliminating the 2.25% benchmark may open Brown up to a more exacting Title IX regime.[12] Although we leave the underlying question unresolved, we think that the district court was entitled to weigh these evolutionary changes in support of the proposed settlement.

There is more. The Objectors' premise is that the Joint Agreement should be viewed as immortal and that, therefore, the class representatives acted foolishly by purchasing a burial plot. This premise, though, is dead on arrival. There was never any realistic prospect that the Joint Agreement would last forever.

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[12] Another part of the Joint Settlement Agreement also has become obsolete. The Joint Agreement's prohibition on retaliation is now superfluous following the Supreme Court's decision in Jackson v. Birmingham Board of Education, 544 U.S. 167, 178 (2005) (holding that "Title IX's private right of action encompasses suits for retaliation"). So, too, the Joint Agreement's reporting requirements are essentially mirrored by the federal mandates in 34 C.F.R. § 668.47.

It has for some time been accepted that, "[i]n institutional reform litigation, injunctions should not operate inviolate in perpetuity." In re Pearson, 990 F.2d 653, 658 (1st Cir. 1993). Thus, the district court's "ongoing supervisory responsibility" over the Joint Agreement "carrie[d] with it a certain correlative discretion." Id. In Justice Cardozo's words, "[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."[13] United States v. Swift & Co., 286 U.S. 106, 114 (1932).

In this instance, the district court canvassed the record and supportably concluded that Brown's current leadership is "steadfastly committed to gender equity in athletics at Brown . . . and to Title IX." Given this conclusion and the evolution of Title IX, we think it reasonable to believe that the Joint Agreement had served its core purpose. While there are doubtless some costs to the class incident to the winding up of the Joint Agreement – as an example, future plaintiffs would have to institute new litigation instead of relying on what the Objectors call the "streamlined" procedures that have been in place – the district court was in the best position to weigh these costs against the benefits

[13] We understand that Brown is a private institution and, as such, the "sensitive federalism concerns" and problems of political accountability that haunt public institutional reform litigation are absent here. Horne v. Flores, 557 U.S. 433, 44849 (2009). But even private consent decrees – when they are long-running – must be reconciled with "changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights" that may "warrant reexamination of the original judgment." Id. at 447-48.

of the Amended Settlement Agreement. Viewed in this light, a 2024 expiration date was not inappropriate. There was no abuse of discretion.

In a final gambit, the Objectors argue that the Amended Settlement Agreement does not "treat[] class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). As evidence of unfair disparity, they point out that only the women's fencing and equestrian teams were reinstated to varsity status by the Amended Settlement Agreement and that women students who matriculate after 2024 (who, after all, are class members) will not benefit at all from the settlement.

The district court did not abuse its discretion in rejecting these arguments. As we already have explained, all of Brown's women's athletes will benefit from the settlement until 2024. And even though only two women's varsity teams were reinstated, the record makes pellucid that Brown – not the class representatives or class counsel – chose those two teams. There is simply no indication that either the class representatives or class counsel "have sold out some of the class members at the expense of others." 4 Newberg § 13:56 (5th ed. 2021 Suppl.).

Nor is the settlement inequitable because the class's future members – those women students who will matriculate after 2024 – will not enjoy the protections of the Joint Agreement. That argument merely reprises the mistaken notion that the original consent decree must live forever. Because the passage of time

works against the Joint Agreement's viability, future students are in this respect not similarly situated to current students. It was fair for the district court to take that difference into account. See Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note to 2018 amendments (explaining that equitable treatment may take "appropriate account of differences among [class members'] claims"). On this record, the district court acted within the encincture of its discretion in finding that a 2024 end date furnishes insufficient cause for disallowing the settlement.

This conclusion is bolstered by the special context presented here. Twice in this litigation, we addressed the gnawing "tension" between class-wide Title IX remedies and the "great leeway" our society affords to universities. Cohen II, 991 F.2d at 906-07; see Cohen IV, 101 F.3d at 187-88 (noting "[o]ur respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs"). The statutory antidiscrimination mandate sometimes compels the court to usurp a university's curricular planning. But that should be the exception, not the rule.

We add a coda. Although we uphold the district court's determination that the Amended Settlement Agreement is fair, reasonable, and adequate, we do not pretend that it is perfect. But "there are unlikely to be ideal solutions to all the vexing problems that might potentially arise" in Title IX class-action litigation involving collegiate programs. Cohen II, 991 F.2d at 907. The settlement reached here, though not perfect,

marks a fitting conclusion to decades of judicial intrusion upon Brown's home field.

III. CONCLUSION

We need go no further. Ensuring gender equality in collegiate athletic programs is serious business. Over nearly three decades, Brown and the class representatives have made considerable strides in this direction, and the need for judicial supervision has diminished. The district court fairly concluded that the finish line is in sight. For the reasons elucidated above, the judgment of the district court is

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

AMY COHEN, *et al.*, *Plaintiffs*, v. BROWN UNIVERSITY, CHRISTINA PAXSON, *as successor to* VARTAN GREGORIAN, and JACK HAYES, *as successor to* DAVID ROACH, *Defendants.*	Case No. 92 Civ. 0197

AMENDMENT TO THE JOINT AGREEMENT

(Filed Dec. 21, 2020)

This Amendment to the Joint Agreement is made between Plaintiffs and Defendants Brown University ("Brown"), Christina H. Paxson, and Jack Hayes.

WHEREAS Plaintiffs initiated this action on April 4, 1992, alleging violations of Title IX of the Education Amendments, 20 U.S.C. §1681;

WHEREAS Plaintiffs and Defendants entered into a Joint Agreement on June 23, 1998, which the Court entered as its Judgment in this case on October 15, 1998 (hereinafter "Joint Agreement");

WHEREAS Brown announced certain changes to its varsity athletics offerings on May 28, 2020, and June 9, 2020;

WHEREAS Plaintiffs filed a Motion to Enforce Judgment, to Adjudge in Contempt, and for Emergency Relief ("Plaintiffs' Motion"), alleging a gross violation of the Joint Agreement on June 29, 2020;

WHEREAS Defendants expressly denied that they were in violation of the Joint Agreement.

WHEREAS Plaintiffs and Defendants (together, the "Parties") reached the agreement reflected in this Amendment to the Joint Agreement (hereinafter "Amendment"), which, if approved by the Court, will resolve the Parties' dispute regarding the claims and issues presented by Plaintiffs' Motion;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, it is agreed by, between, and among the Parties that, subject to Court approval, the Parties' dispute regarding the claims and issues presented by Plaintiffs' Motion shall be fully and completely settled and resolved according to the following terms and conditions:

I. GENERAL PROVISIONS

A. This Amendment shall be binding on the Parties hereto, as well as their successors, as the case may be, only if approved by the Court as set forth herein.

B. This Amendment modifies the Joint Agreement. In case of a conflict between the provisions of this Amendment and any other provisions of the Joint Agreement, the provisions of this Amendment shall govern.

C. Except as expressly amended or modified by this Amendment, all terms, covenants and provisions of the Joint Agreement are and shall remain in full force and effect until August 31, 2024.

D. This Amendment resolves all issues and claims for relief, including injunctive or declaratory relief, presented by Plaintiffs' Motion.

II. BROWN'S INTERCOLLEGIATE ATHLETICS PROGRAM

A. Upon Preliminary Approval of the Amendment by the Court, Brown shall restore to varsity status certain teams that Brown has selected. These teams are:

1. Women's Equestrian; and

2. Women's Fencing.

B. During the remaining term of the Joint Agreement as amended by this Amendment:

1. If Brown restores to varsity status a men's team that was slated to transition from varsity to club status in May 2020, other than the previously restored men's track & field and cross country teams,

then the total number of women's teams restored to varsity status must be at least two greater than the number of men's teams restored.

2. Brown shall not add any additional men's teams to its varsity program other than as provided above.

C. Brown will maintain at least the same level of support for each varsity women's team it restores to varsity status that the team received before the team was transitioned from varsity status in May 2020, although the level of support may be reduced commensurate with reductions in the overall level of funding for Brown's athletics program.

1. In the event that there are reductions in the overall level of funding for Brown's athletics program, Brown will not reduce overall funding for its women's teams any more than it reduces overall funding for its men's teams with the exception that, in a year in which a team does not compete due to COVID-19, that team's operating budget may be reduced to reflect declines in the expenses associated with training, team travel and other aspects of competition, which may result in variation between teams that play in different seasons.

2. Information concerning the level of support for each of the restored teams is contained in Brown's annual EADA reports, which will be provided to Plaintiffs'

counsel within ten (10) business days of submission. Brown will provide that same information for each of the restored teams in its final annual report provided under the Joint Agreement no later than August 1, 2024.

D. Plaintiffs acknowledge that Brown has elevated its sailing program to varsity status and has announced the creation of separate Women's and Co-ed varsity sailing teams. Brown acknowledges that Plaintiffs do not agree that these are two separate teams. The Parties agree that the amended Joint Agreement does not resolve this dispute.

   1. To calculate the average number of male and female sailors on the first and last day of competition for purposes of the Joint Agreement, each individual identified on one or more sailing squad list(s) shall be counted only as a single participant. Counting participation opportunities for sailing in this way for purposes of the Joint Agreement is without prejudice to Brown treating or counting participation opportunities on its sailing teams differently in any other context.

E. Brown shall not reduce the status of or eliminate any women's varsity team for the remaining term of the Joint Agreement as amended by this Amendment.

III. REMAINING TERM OF THE JOINT AGREEMENT

A. The Joint Agreement shall terminate on August 31, 2024.

B. Brown's reporting obligation and the attendant deadline under Section V.A of the Joint Agreement (*i.e.*, by no later than August 1, 2024), shall remain in full force and effect through August 31, 2024.

C. For the 2023-2024 academic year only, Brown shall provide interim reports of participation rates within thirty days after the first date of competition for each varsity team. The Parties acknowledge that these interim reports will be a snapshot in time of the current season, and that they will not be determinative of whether Brown is in violation of the 2.25% variance requirement under the Joint Agreement.

IV. DISPUTE RESOLUTION

A. If, between now and the time at which the Joint Agreement terminates in August 2024, the Parties have a dispute as to whether Brown remains in compliance with the provisions herein or the 2.25% variance in the Joint Agreement, the parties agree to first mediate their dispute in good faith before Magistrate Judge Patricia A. Sullivan. If any such mediation is unsuccessful, either party may seek court intervention, including in the event of a purported gross violation.

1. If Magistrate Judge Sullivan is unable to serve as mediator, then the Parties shall select another mediator within three (3) business days. The Parties will use their best efforts to agree upon another mediator.

2. If, however, the Parties cannot come to an agreement on another mediator within three (3) business days, then the district court judge presiding over the case will select the mediator with a preference for a federal magistrate judge or a retired federal district court or magistrate judge from either the District of Rhode Island or the District of Massachusetts.

B. The Parties agree that the Joint Agreement, as amended by this Amendment, will not limit, resolve, or determine any claims or defenses that may arise after August 31, 2024 under then applicable law.

V. CLASS NOTICE AND JUDICIAL APPROVAL

A. Upon finalization of this Amendment, the Parties shall promptly present the Amendment to the Court in a Joint Motion for Preliminary Approval of the Settlement ("Joint Motion for Preliminary Approval"), and will propose notice to the class, which will be directed at all present and future Brown women students and potential women students who participate or will seek to participate in intercollegiate athletics at Brown. The fairness hearing required by federal law to approve the Proposed

Amendment to the Joint Agreement will be held, and the Parties will cooperate with respect to any such fairness hearing, with Brown bearing all costs of providing notice to the plaintiff class.

B. After the Court has conducted a fairness hearing and approved this Amendment, Brown will pay Plaintiffs' reasonable attorneys' fees, costs, and expenses, including expert witness fees, in connection with the current proceeding, including reasonable fees and expenses of any fairness hearing, in an amount either to be determined in mediation with Magistrate Judge Sullivan or, if no agreement is reached in mediation, by the Court.

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Counsel for Defendants

SO ORDERED.

/s/ John J. McConnell, Jr. Date: December 21, 2020
John J. McConnell, Jr., U.S.D.J.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

AMY COHEN, et al., each individually and on behalf of all others similarly situated, plaintiffs,	)	
v.	)	C.A. No. 92-0197
BROWN UNIVERSITY, VARTAN GREGORIAN, and DAVID ROACH, defendants.	)	

OPINION AND ORDER

(Filed Mar. 29, 1995)

PETTINE, RAYMOND J., Senior U.S. District Judge

I. INTRODUCTION

This is a class action lawsuit charging Brown University, its president, and its athletic director (collectively "Brown") with violating Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1988) ("Title IX").[1] Specifically, the plaintiff class, which consists of all present and future Brown University women students and potential students who

[1] Title IX applies only to those institutions that receive federal financial assistance. 20 U.S.C. § 1681. Brown University receives federal funds and is therefore required to comply with Title IX.

participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown, contends that defendants have discriminated against women in the operation of Brown's intercollegiate athletic program. After carefully considering the legal arguments and evidence presented throughout the thirty day trial on the merits, I find Brown University to be in violation of Title IX.

This suit was initiated in response to the demotion of the women's gymnastics and volleyball teams at Brown from full varsity to club varsity status in May of 1991. Up until that time, both teams were fully funded by the University. At the same time that Brown demoted these two women's teams, and apparently in an effort to comply with its understanding of Title IX's directives, Brown also demoted two men's fully funded varsity teams, water polo and golf, to club varsity status. At that time, all four teams were stripped of their university funding and most of their varsity privileges.[2] Plaintiffs allege that, against a background in which men at Brown already enjoyed a disproportionately large share of the resources expended on athletics and of the intercollegiate participation opportunities afforded to student athletes, the facially

[2] Financial considerations prompted the demotions. Brown expected to save $77,823 per year as a result of these reductions. Most of the savings realized by eliminating the funding for the four teams came from the women's athletic budget. Brown saved $62,028 by demoting the women's volleyball and gymnastics teams and $15,795 by demoting the men's golf and water polo teams. However, the status reductions did not appreciably affect the athletic participation gender ratio.

even-handed demotions perpetuated Brown's discriminatory treatment of women.

Prior to the trial on the merits, this Court granted plaintiffs' motion for class certification and denied defendants' motion to dismiss. This Court subsequently heard fourteen days of testimony on plaintiffs' motion for a preliminary injunction. I ordered that the women's gymnastics and volleyball teams be reinstated to fully funded varsity status and prohibited Brown from eliminating or reducing the status or funding of any existing women's intercollegiate varsity team until the case was resolved on the merits. Cohen v. Brown Univ., 809 F.Supp. 978 (D.R.I. 1992). "After mapping Title IX's rugged legal terrain and cutting a passable swath through the factual thicket that overspreads the parties' arguments," the First Circuit affirmed. Cohen v. Brown Univ., 991 F.2d 888, 891 (1st Cir. 1993).

At the time of the preliminary injunction, there was virtually no case law on point. Since issuance of the First Circuit's opinion, a number of other circuits have been faced with Title IX athletic discrimination suits. See, e.g., Horner v. Kentucky High Sch. Athletic Ass'n., 43 F.3d 265 (6th Cir. 1994); Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994), cert. denied, 115 S.Ct. 938 (1995); Favia v. Indiana Univ. of Pennsylvania, 7 F.3d 332 (3d Cir. 1993); Roberts v. Colorado State Bd. of Agriculture, 998 F.2d 824 (10th Cir.), cert. denied, 114 S.Ct. 580 (1993). The Third, Sixth, Seventh, and Tenth Circuits are in agreement with the First Circuit's interpretation of the law and relevant agency

documents. These developments have been explored in a number of recent law review articles.[3] In the instant

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[3] See, e.g., Jennifer L. Henderson, Gender Equity in Intercollegiate Athletics: A Commitment to Fairness, 5 Seton Hall J. Sport L. 133 (1995); Janet Judge et al., Perspective, Gender Equity in the 1990s: An Athletic Administrator's Survival Guide to Title IX and Gender Equity Compliance, 5 Seton Hall J. Sport L. 313 (1995); Diane Heckman, The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity" Standard, 1994 Det. C.L. Rev. 953 (1994); Teresa M. Miguel, Title IX and Gender Equity in Intercollegiate Athletics: Case Analyses, Legal Implications, and the Movement Toward Compliance, 1 Sports Law. J. 279 (1994); B. Glenn George, Miles to Go and Promises to Keep: A Case Study in Title IX, 64 U. Colo. L. Rev. 555 (1993); William E. Thro & Brian A. Snow, Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics, 84 Ed. Law Rep. 611 (1993); Jill K. Johnson, Note, Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance, 74 B.U. L. Rev. 553 (1994); R. Lindsay Marshall, Case Comment, Cohen v. Brown University: The First Circuit Breaks New Ground Regarding Title IX's Application to Intercollegiate Athletics, 28 Ga. L. Rev. 837 (1994); Mary Beth Petriella, Note, Injunctive Relief--Title IX--Interim Preliminary Injunction Reinstating Varsity Status to Demoted Collegiate Athletic Teams is Available When That Team Alleges a Title IX Violation and Litigation is Pending--Cohen v. Brown . . . , 4 Seton Hall J. Sport L. 595 (1994); Catherine Pieronek, Note, A Clash of Titans: College Football v. Title IX, 20 J.C. & U.L. 351 (1994); and William H. Webb, Jr., Case Comment, Sports Law--Cohen v. Brown University: The Promulgation of Gender Equity in Intercollegiate Athletics, 25 U. Mem. L. Rev. 351 (1994).

The defendants submitted one such piece for my consideration with their post trial memoranda. Walter B. Connolly, Jr. & Jeffrey D. Adelman, A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios, 71 U. Det. Mercy L. Rev. 845 (1994). This Court, however, can hardly accept as authoritative a law review article co-written by defense counsel.

case, defendants have advanced several provocative arguments that require a thorough examination of the relevant law. In addition, the unusual two-tiered structure of Brown's intercollegiate athletic program presents a unique factual situation requiring this Court to engage in an exhaustive analysis of Title IX and its regulatory complements.

First, I will chronicle the factual background of this case. Second, I will address several preliminary matters. Third, I will outline the legal framework of Title IX and the implementing regulations and interpretation. Fourth, I will review the degree of deference due these agency documents. Fifth, I will set forth this Court's interpretation of the law and will explain why the alternative interpretations offered by counsel must be rejected. Finally, I will discuss the specifics of this case in light of my legal conclusions.

II. FACTUAL BACKGROUND

Brown University is a Division I institution within the National Collegiate Athletic Association ("NCAA"). As such, Brown participates at the highest level of NCAA competition.[4] Brown currently offers an extensive athletic program for its students.[5] At the

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[4] Brown football, however, is a Division I-AA sport and therefore participates at the second highest level of NCAA competition.

[5] Defendants repeatedly point to the fact that Brown's program offerings for women exceed the national average of women's sports per institution. However, Brown also exceeds the national average of men's sports per institution. The fact that Brown's athletic offerings are "extensive" cannot and does not excuse its

intercollegiate level it funds 13 sports for women and 12 sports for men. Additionally, it recognizes, but does not fund, several sports as "donor-funded" varsities (four men's teams and three women's teams).[6] Although the number of varsity sports offered to men and women are equal, the selection of sports offered to each gender generates far more individual positions for male athletes than for female athletes.

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failure to comply with Title IX. That other universities may be even more clearly in violation of Title IX's nondiscrimination mandate does not exonerate an institution that still provides unequal opportunities to its own male and female students.

[6] This "intermediate" program level has been in flux since its inception. Both the name and the treatment of these teams have changed over the last three years. In May 1991 the demoted teams were labeled "club varsity" teams. The athletic director announced that the four teams would no longer receive funds from the University but would continue to be treated in all other ways as a varsity team. The teams would remain eligible for NCAA competition if they continued to comply with NCAA requirements and if they were able to raise the funds to maintain a sufficient level of competitiveness. During the next season, however, it became apparent that "club varsities" were not receiving the same university privileges as "true" varsities. In December of 1991, the athletic director decided that the term "club varsity" was misleading and changed it to "intercollegiate club" in order to avoid misleading prospective student-athletes. By the time of trial, both the treatment and name of the intermediate teams had further evolved. Brown restored some of the traditional varsity privileges to these teams and now refers to them as "donor-funded," "gift-funded," or "unfunded" varsities. For ease of reference, I will use the term "donor-funded" varsity.

Brown provides the financial resources to sustain the budgets of the "university-funded" varsities, whereas, it requires donor-funded teams to raise their own funds through private donations in order to exist. Brown also provides certain services and privileges to the university-funded varsities but not to the donor-funded varsities.[7]

A consequence of this two-tiered system is that most donor-funded varsities have found it difficult to maintain a level of competitiveness as high as their ability would otherwise permit. Their competitive disadvantage in comparison to university-funded teams is due, in part, to the reluctance of some schools to include donor-funded teams in their varsity schedules[8]

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[7] While Brown, since the end of the 1993-94 season, has decided to provide donor-funded varsities with access to the weight and training rooms and with special admissions considerations, it is not yet clear to what extent all of these varsity advantages will actually be provided to donor-funded varsities on the same basis as they are provided to university-funded varsities. For example, free trainer services are not always available to donor-funded and university-funded varsity teams on an equal basis. Brown does not provide donor-funded varsities with other university amenities, such as office space, campus telephone privileges, secretarial support, and possibly laundry facilities and free interterm housing.

More importantly, Brown also does not guarantee that donor-funded teams will have coaching, equipment and supplies, money for travel (including meals and lodging) and for post-season competition. Brown guarantees all of the above to its university-funded varsities.

[8] For instance, when volleyball was originally demoted, two schools called to cancel their competitions with Brown because of the team's demotion. The volleyball coach also cancelled one tournament because she was unsure if the team would be able to raise

and in part to the inability of the teams to obtain varsity-level coaching[9] and recruits,[10] or to obtain

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enough money to afford the trip. Prelim. Inj. Hr'g Tr. 11/2/92 at 138-39.

[9] The women's ski team, for example, during the 1993-94 season could only afford to hire one coach to train the men's and women's ski teams two nights a week and another to show up for competitions. Currently, the donor-funded women's ski team can only afford to contribute $1,000 toward coach's compensation; the men's club ski team will match this amount, and the two teams will share the coach. The team captain is responsible for any other training the team does. Trial Tr. 9/29/94 at 11-12, 22, 31.

Similarly, the gymnastics team, in the absence of the preliminary injunction, would have been drastically underfunded. The gymnastics team has never been able to raise close to the amount of money required to retain its coach at her current salary, much less to meet other operating expenses of the team. See Trial Tr. 9/27/94 at 171.

[10] Eileen Rocchio, a member of the gymnastics team, testified that she "wouldn't have come to Brown unless [she] knew that it was a varsity team." Prelim. Inj. Hr'g Tr. 10/28/92 at 137. See also Prelim. Inj. Hr'g Tr. 10/29/92 at 19-20 ("I would never have gone to Brown knowing and . . . having to worry about fund raising and lockers and . . . trainers and not getting to fulfill my potential as . . . an athlete. Those are things that I . . . would go to a school so that they could provide me with, not that I would have to worry about finding them on my own").

The inability to recruit team members of a high caliber greatly affects the competitive level of a team. For example, when the volleyball team was demoted and lost its recruiting appeal, the team had no alternative but to accept far less accomplished athletes, and it effectively ceased to exist as a varsity level team. Trial Tr. 9/29/94 at 188-90.

funds for travel,[11] post-season competition[12] and equipment.[13]

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[11] Elliot Lilien, former head coach and current assistant coach of men's and women's fencing testified as follows:

> Q: So did you consider the amount of finances that you had in picking a schedule and deciding which teams against which to compete?
>
> A: Sure.
>
> . . .
>
> A: Now if we were to aim at a higher level of competition, no, we didn't have enough [funds] then. (Trial Tr. 9/27/94 at 102).
>
> . . .
>
> A: I've always thought Brown was a gold mine for fencing and if there was sufficient commitment made to it, Brown could compete with anyone in the country. (Trial Tr. 9/27/94 at 104).

See also Trial Tr. 9/27/94 at 31-33 (fencing team did not join Ivy League round robin due to insufficient commitment from Brown; team could not compete successfully in the round robin without coaching, travel allotments and practice space comparable to that afforded to the other teams participating in that league).

[12] Gymnast was unable to attend the NCAA Eastern Regional Championships due to team's financial constraints. Prelim. Inj. Hr'g Tr. 10/29/92 at 18.

[13] The captain of the women's ski team testified, for example, that the gates the team uses in practice have not been replaced in over ten years due to the team's lack of funds. "[I]f they break, we're in big trouble because we have no money to replace any of our training gates. So we would be at a loss, a big loss if one of the gates breaks which is very plausible." Trial Tr. 9/29/94 at 34.

A coach of the women's fencing team expressed similar concerns about the team's limited access to electric equipment. He explained that "electric weapons are somewhat differently weighted and feel differently [from conventional weapons]." Trial

Extensive testimony demonstrated that several donor-funded teams do have the interest and ability to compete at the top varsity level and would benefit from university-funded status. I find that the donor-funded women's gymnastics, women's fencing, and women's ski teams have demonstrated this interest and ability. The women's gymnastics team was a thriving university-funded varsity team prior to the 1991 demotion; in fact, the team won the Ivy League championship in 1989-90. See, e.g., testimony of Athletic Director Roach, Prelim. Inj. Hr'g Tr. 11/4/92 at 86 (acknowledging that at the time gymnastics was demoted, the team had the interest and ability to compete at the varsity level). The women's fencing team has been successful for many years against a number of club and varsity competitors, and, prior to the demotions, John Parry, who was the athletic director at that time, supported the team's request to be upgraded to varsity status. Prelim. Inj. Hr'g Tr. 10/27/92 at 122-26. Despite a meager budget, the women's ski team has consistently fielded a competitive team in the U.S. Collegiate Ski Association Osborne Division. See Trial Tr. 9/28/94 at 12-14 (head coach of Smith College women's varsity ski team testifying to strength and stability of the Brown University women's ski team).

Additionally, women's water polo, a club team, has demonstrated the interest and ability to compete at

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Tr. 9/27/94 at 107. Electric equipment is used in competition, but the team "seldom used electric equipment in practice because of the fear that it would break and [the team] wouldn't be able to -- to replace it." Trial Tr. 9/27/94 at 20.

the highest varsity level.[14] The women's water polo team, according to the coach of men's and women's water polo, is able to compete at a varsity level. See Trial Tr. 10/3/94 at 65 (testifying to varsity ability and schedule of the women's water polo team). See also Trial Tr. 10/5/94 at 18-20 (head coach of Slippery Rock University men's and women's varsity water polo teams testifying to stability and achievements of Brown University women's water polo team).

I also find that although all four teams would benefit from university-funded varsity status, only two of these teams, volleyball and skiing, would be able to sustain a competitive intercollegiate varsity schedule if supported at donor-funded status. The testimony demonstrated that gymnastics would effectively cease to exist as an intercollegiate varsity team if it were denied university funding. The gymnastics team does not attract enough private donations to afford quality coaching. See supra note 9. In addition, a donor-funded gymnastics team will draw less talented individuals to the team, which will, as a result, suffer competitively. The testimony also established that elevation of women's water polo, currently a club team, to donor-funded status would actually be financially disadvantageous for the team. As a club sport, the team currently receives $3000 from the Student Activities

[14] This is a non-inclusive list; there may be other women's club sports with sufficient interest and ability to warrant elevation to varsity status. Plaintiffs, however, did not introduce any substantial evidence at trial to prove the existence of other women's club teams meeting the criteria.

organization; as a donor-funded sport, the team would be required to raise all of its own funds. Trial Tr. 10/3/94 at 26.

In Cohen, I summarized the history of athletics at Brown University:

> Nearly all of the men's varsity teams were established before 1927. Baseball was created first in 1869, followed by football in 1878 and track in 1879. The only men's teams established after 1927 were crew in 1961, water polo in 1974 [elevated to varsity in 1981], and squash in 1989 [provided with varsity services but fully endowed through private donations]. By comparison, virtually all of the women's varsity teams were created between 1971 and 1977. The only women's varsity team created after this period was winter track in 1982. Before 1971, all women's sports were operated out of a separate athletic program at Pembroke College, a sub-unit of Brown University until its merger with Brown College during that year. Before the merger, the women's athletic program at Pembroke bore no resemblance to the program which Brown provided to its male varsity athletes. While Pembroke did have few intercollegiate teams (e.g., field hockey, basketball, tennis), the women's program received very little financial or institutional support from the university.

Cohen, 809 F.Supp. at 981.

At the present time, Brown's intercollegiate athletic program[15] consists of 32 teams. The list of varsity teams and their respective participants for the last complete season (1993/94), with program offering updates, are as follows:[16]

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[15] For a complete definition of intercollegiate athletics as defined by the relevant agency document, see infra part VI.A.1.a.

[16] Although the 1994/95 season has already started, with new program offerings in place, I have chosen to use data from 1993/94 to calculate participation numbers. The 1994/95 participation numbers are necessarily incomplete and unreliable given that Spring sports had not yet begun at the close of the trial. However, the lists below do reflect the 1994/95 upgrade in status of women's volleyball to university-funded varsity and women's skiing to donor-funded varsity. I have used this combination of 1993/94 numbers and 1994/95 program offerings in order to reflect most accurately the current program.

I derived the 1993/94 participation numbers from the NCAA Squad Lists, Pls.' Ex. 32, which I find to be the most accurate, if imperfect, representation of varsity participants available. These lists are maintained by the athletic department and periodically updated by team coaches. I did not include student-athletes who either quit or were cut from the team, except where the change occurred very late in the season. I did, however, count participants marked as injured under the assumption that they remained team members.

I decline to rely upon the NCAA Sport Sponsorship Forms submitted to the NCAA by the athletic department at the end of the year. Joan Taylor, Brown's Associate Athletic Director and the Senior Women's Administrator, testified that the number of varsity participants on the sponsorship forms is a rough figure "because the N.C.A.A.'s reason for this form is only to make sure that we have at least met the minimum criteria for Division I sport sponsorship." Trial Tr. 10/3/94 at 169. The NCAA Squad Lists, on the other hand, report on the individual eligibility of each member of the team. For that reason, the NCAA Squad Lists, unlike the NCAA Sports Sponsorship Forms, list the names

WOMEN		MEN	
University-funded		University-funded	
Basketball:	12	Baseball:	30
Crew:	50	Basketball:	17
Cross-Country:	18	Crew:	45
Field Hockey:	36	Cross-Country:	20
Ice Hockey:	22	Football:	126
Lacrosse:	34	Ice Hockey:	41
Soccer:	22	Lacrosse:	44
Softball:	15	Soccer:	32
Squash:	15	Swimming:	24
Swimming:	27	Tennis:	12
Tennis:	10	Track:	56
Track:	39	Wrestling:	32
Volleyball[17]:	09		
Donor-funded		Donor-funded	
Fencing:	10	Fencing:	26
Gymnastics[18]:	10	Golf:	14
Skiing[19]:	09	Squash:	15

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of individual athletes, thus permitting verification of team participation numbers. The Squad Lists are maintained by the athletic department and are updated periodically throughout the season.

[17] During the 1994/95 season Brown guaranteed the volleyball team university-funded varsity status for the next five years.

[18] Gymnastics is currently supported as a university-funded team as required by court order. However, in the absence of this order, Brown has acknowledged that it would demote gymnastics to donor-funded status. See Trial Tr. 11/21/94 at 25. I therefore include gymnastics as a donor-funded team.

It is arguable that gymnastics should be counted only as a club team because the testimony demonstrated that gymnastics would, within a few seasons, effectively cease to exist as an intercollegiate varsity team if it were denied university funding.

[19] Women's skiing was upgraded in 1994/95 to donor-funded status. Prior to this season, the athletic department did not

Miscellaneous[20]		Water polo:	21
Men's Golf:	01		
Men's Crew:	03		
Total women varsity:	342	Total men varsity:	555

I find that 342 women (38.13% of athletes) and 555 men (61.87% of athletes) were members of varsity teams for the majority of the last complete season and therefore count as "participants" in intercollegiate athletics for the purpose of Title IX analysis.

Defendants argue that there is no consistent measure of actual participation rates because team size varies throughout the athletic season. Defendants observe that injuries, "cuts," and "quits" result in different team numbers depending on when in the season team rosters are tallied. Counting the number of participants at the end of the last complete season, rather than at some arbitrary point in the season, addresses this concern. A team member who participated for the majority of the season should be acknowledged as a participant. Once the season is over, it is possible to assess which of the individuals listed on the roster at the beginning of the season remained team members.

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maintain an NCAA Squad List for the team because the team was a club sport. I therefore rely on the 1994/95 NCAA Squad List to count ski team participants.

[20] There are four women who participate on men's teams: three female coxswains on the men's crew team and a female golfer on the men's golf team.

Defendants further argue that there is no consistent measure of actual participation rates because there are alternative definitions of "participant" that yield very different participation totals. For instance, a "participant" could be defined to include every member of the team, even habitual "bench-warmers," or to include only "core" players. Including as "participants" all of the students who were members of the team for a majority of the season addresses this concern. Where both the athlete and coach determine that there is a place on the team for a student, it is not for this Court to second-guess their judgment and impose its own, or anyone else's, definition of a valuable or genuine varsity experience. It is the nature of a team that each student makes a different contribution to the team's success and takes from it a unique experience. Every varsity team member is therefore a varsity "participant."

Thus, in 1993/94, there were 897 student athletes participating in varsity athletics. Of this total, 555 (61.87%) were men and 342 (38.13%) were women. During that same year, the undergraduate enrollment was 5722 students; this included 2796 men (48.86%) and 2926 women (51.14%). Pls.' Ex. 33.

III. PRELIMINARY MATTERS

A. Partial Settlement of the Case

On December 16, 1994, during the course of the trial on the merits, this Court entered a Settlement Agreement and Stipulation of Dismissal in Regard to

Equality of Treatment ("Settlement Agreement"). The agreement settled plaintiffs' allegations that significant disparities exist in the relative financial support of and benefits given to men's and women's university-funded varsity teams.[21] The treatment issues settled by this agreement concern only university-funded varsity teams as to which there is no dispute regarding status and does not preclude consideration by the Court of any evidence relevant to issues in contention. Thus, the instant Opinion and Order focuses primarily on plaintiffs' alternative claim that significant disparities exist in the number of intercollegiate participation opportunities available to men and those available to women. Therefore, in assessing Brown's compliance with Title IX, I will address whether the University accommodates effectively "the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes." Policy Interpretation, 44 Fed. Reg. 71,413, at 71,417 (1979). In addition, this Opinion and Order deals briefly with the treatment of teams as to which there is a dispute concerning status.

B. The Precedential Effect of the First Circuit's Preliminary Injunction Ruling

Brown has advanced the argument that any findings of fact and conclusions of law made by the First

[21] The treatment of men's and women's teams addressed by the Settlement Agreement is governed by 34 C.F.R. § 106.41(c)(2)-(10). See infra part IV.B.

Circuit during the preliminary injunction phase of this case are not binding on this Court's ruling on the merits. They note that "[a] preliminary injunction is 'by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness.'" Defs.' Mem. of Law Re Law of the Case at 2 (quoting Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953)). Further, they reason that a court confronted with different facts, arguments, and issues may reach different conclusions about legal standards or statutory and regulatory interpretations. Defs.' Reply Mem. Re Law of the Case at 3. During the trial on the merits, defendants urged this Court to find that it had the authority to disregard the interpretation of Title IX adopted by the First Circuit in upholding the preliminary injunction issued by this Court.

Defendants are correct that the factual determinations set forth in Cohen, 809 F.Supp. 978, and upheld by the First Circuit on appeal are not binding on the decision currently before me. Similarly, this Court is not bound by the First Circuit's application of the law to the facts then in evidence. It is well-settled that at the preliminary injunction stage, an appellate court's "'findings' and 'holdings' as to the merits of the case are not final but should be understood to be merely statements of probable outcomes based on the record as it existed before the district court." LeBeau v. Spirito, 703 F.2d 639, 643 (1st Cir. 1983) (citing Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981)).

Defendants incorrectly extend this general principle to support their position that this Court is not bound to follow the First Circuit's legal pronouncements. A district court is not free to determine anew issues of law already presented to and decided by the appellate court. Statements of law made by an appellate court, whether set forth in an opinion reviewing a preliminary injunction or in an opinion reviewing the outcome of a trial on the merits, become the law of the circuit and, as established precedent, bind the district courts.[22]

In any case, the question is academic because this Court is in accord with the First Circuit's interpretation of Title IX as set forth in Cohen, 991 F.2d 888. Nothing in the record before me, now fully developed, undermines the considered legal framework established by the First Circuit at the preliminary injunction stage. However, the existence of new facts and legal arguments presented at trial does require a full

[22] District and circuit courts commonly accord appellate court pronouncements of law rendered in reviewing preliminary injunctions precedential value sub silentio. For example, Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006 (1st Cir. 1981) considered a district court's denial of a preliminary injunction and has been relied upon by district courts and by the Court of Appeals. See, e.g., Massachusetts v. Secretary of Health and Human Servs., 899 F.2d 53, 66 (1st Cir. 1990) (stating "[t]he regulations also run afoul of our holding in [Bellotti], in which we invalidated a twenty-four hour waiting period requirement contained in a Massachusetts statute regulating abortions"), vacated and remanded sub nom. Sullivan v. Massachusetts, 500 U.S. 949 (1991); and Women's Medical Center of Providence, Inc. v. Roberts, 530 F.Supp. 1136, 1143, 1145, 1147, 1149, 1150-51, 1153 (D.R.I. 1982).

examination of and expansion upon the foundations laid by the First Circuit.

Naturally, as defendants contend, to the extent that the appellate court has not been presented with and has not decided any legal issue now material to the case, this Court must interpret the law without the benefit of guidance from the appellate court.

IV. LEGAL FRAMEWORK

A. Title IX

The text of Title IX does not explicitly prohibit gender discrimination in athletics. Rather, Title IX is a general prohibition of sex discrimination in all aspects of educational institutions receiving federal funding:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance [with exemptions not applicable to this case].

20 U.S.C. § 1681(a). In order for this prohibition to apply to an institution's athletic programs, the athletic department need not be the direct recipient of federal funding; rather it is well-settled that Title IX applies to all of an institution's programs if any part of an educational institution receives federal funds. Cohen, 809 F.Supp. at 982-83 (citations omitted).

In addition, Title IX specifies that its proscription of gender discrimination in athletics should not be "interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of [a gender] imbalance" between the persons participating in the program and the total number of persons in the relevant community. 20 U.S.C. § 1681(b). However, subsection (b) also provides that it "shall not be construed to prevent the consideration in any . . . proceeding . . . of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." 20 U.S.C. § 1681(b). Thus, Title IX "does not mandate strict numerical equality between the gender balance of a college's athletic program and the gender balance of its student body." Cohen, 991 F.2d at 894. The practical effect of subsection (b) is that:

> [A] court assessing Title IX compliance may not find a violation solely because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand.
>
> That is not to say, however, that evidence of such disparity is irrelevant. Quite the contrary: under the proviso contained in section 1681(b), a Title IX plaintiff in an athletic discrimination suit must accompany statistical evidence of disparate impact with some further evidence of discrimination, such as

> unmet need amongst the members of the disadvantaged gender.

Cohen, 991 F.2d at 895. Thus, evidence of gender imbalance in Brown's athletic programs is relevant to a determination of non-compliance but not sufficient by itself to mandate a finding of Title IX violation.

B. Regulations

The U.S. Department of Education ("DED") acting through its Office of Civil Rights ("OCR") is responsible for administering Title IX.[23] Pursuant to the statutory mandate, DED promulgated regulations controlling "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance." 34 C.F.R. § 106 (1994). The regulations specifically address athletic program administration at 34 C.F.R. §§ 106.37(c)[24] and 106.41.

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[23] For the shift in agency responsibility for Title IX administration, see Cohen, 991 F.2d at 895 (describing the shift of authority from Health Education and Welfare ("HEW") to its successor agency, DED, when HEW was split into the Department of Health and Human Services ("HHS") and DED). The regulations and the Policy Interpretation discussed below were originally promulgated by HEW, in 1975 and 1979, respectively. For the purposes of this discussion, however, I will refer to DED as the promulgating agency "because the agency adopted the very same regulation which the Policy Interpretation was issued to interpret." Horner, 43 F.3d at 273 n.6 (citing Cohen v. Brown Univ., 991 F.2d 888, 896 n.10 (1st Cir. 1993)).

[24] This provision governs the distribution of athletic scholarships under the general caption of financial assistance in education programs. Brown University, as an Ivy League institution, does not grant athletic scholarships to its students. Therefore,

Paralleling the language of Title IX, section 106.41(a) states:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a). The regulations go on to clarify, however, that institutions are permitted to "operate or sponsor separate teams for members of each sex" under certain circumstances detailed therein. 34 C.F.R. § 106.41(b).

Section 106.41(c), entitled "Equal Opportunity," addresses the most critical issue in this case. Regardless of what teams, if any, an institution offers, its athletic program must afford equal opportunities to male and female athletes. The section reads, in pertinent part:

In determining whether equal opportunities are available the Director will consider, among other factors:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

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section 106.37(c) is not at issue in this case, and I do not address it.

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

34 C.F.R. § 106.41(c). The trial on the merits focused on the first of these ten factors, the "effective accommodation" element. The other nine factors concern "treatment issues," which were settled by the parties only as to equivalence between men's and women's teams voluntarily maintained by Brown at the university-funded level. See discussion supra part III.A.

C. Policy Interpretation

Several years after the regulations were promulgated, DED's Office of Civil Rights[25] proposed a policy

[25] At the time the Policy Interpretation was originally published, the Office of Civil Rights operated within HEW. DED subsequently inherited the final Policy Interpretation. When DED re-promulgated the exact same regulations which the Policy Interpretation was issued to interpret, see supra note 23, DED

interpretation designed to resolve confusion concerning Title IX compliance. After considering public comments, it published the final Policy Interpretation in the Federal Register. 44 Fed. Reg. 71,413 (1979). The Policy Interpretation:

> clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at [34 C.F.R. §§ 106.37(c) and 106.41(c)].

44 Fed. Reg. at 71,415. The Policy Interpretation is divided into three categories: "Athletic Financial Assistance (Scholarships)," 44 Fed. Reg. at 71,415; "Equivalence in Other Athletic Benefits and Opportunities," 44 Fed. Reg. at 71,415; and "Effective Accommodation of Student Interests and Abilities." 44 Fed. Reg. at 71,417. Litigation focused on the "Effective Accommodation" section.

The "Effective Accommodation" section of the Policy Interpretation interprets the first of the ten factors found in the regulations at 34 C.F.R. § 106.41(c)(1) (stating that the Director should consider "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes"). The Policy Interpretation

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sent "an unmistakably clear signal of the agency's satisfaction with the Policy Interpretation." Cohen, 991 F.2d at 896 n.10.

measures compliance in the area of effective accommodation first by applying a three prong test and second by applying a two part test. The three prong test assesses compliance by determining:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418. The two part test[26] assesses compliance by examining:

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[26] The two part test is not at issue in this case and is listed solely for the purpose of providing a more complete context for the provisions that are central to this case. At the preliminary injunction stage I found, tentatively, that "the competitive schedules at Brown provide men and women with 'equivalently advanced competitive opportunities.' " Cohen, 809 F.Supp. at 994. Nothing introduced at the trial on the merits alters my opinion that the

> (1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or
>
> (2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

44 Fed. Reg. at 71,418.

The "Effective Accommodation" section of the Policy Interpretation, which includes both the three prong test and the two part test, also provides that a school need not establish an intercollegiate team where there is no reasonable expectation of competition in that sport within the institution's normal geographic area of competition. 44 Fed. Reg. at 71,418.

Finally, the Policy Interpretation's "Effective Accommodation" section provides that the following factors should be considered in an overall determination of compliance pursuant to 34 C.F.R. § 106.41(c):

> (a) Whether the policies of an institution are discriminatory in language or effect; or

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competitive schedules offered to men and women at the university-funded varsity level are equivalent to each other and that the competitive schedules offered to men and women at the donor-funded varsity level are equivalent to each other.

> (b) Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or
>
> (c) Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

44 Fed. Reg. 71,418.

D. Title IX Athletics Investigator's Manual

The 1990 Title IX Athletics Investigator's Manual, published by OCR, was designed to assist OCR investigators in determining whether an institution is in compliance with Title IX. The Manual serves as a practical guide in the agency's enforcement of the Policy Interpretation. Valerie M. Bonnette & Lamar Daniel, Department of Education, Title IX Athletics Investigator's Manual (1990).

V. DEFERENCE TO AGENCY REGULATIONS AND INTERPRETATION OF TITLE IX

In Cohen, the First Circuit held that the regulations promulgated pursuant to Title IX deserve controlling weight. 991 F.2d at 895. This degree of deference is appropriate because Congress "explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX." Cohen, 991

F.2d at 895 (citations omitted). See Javits Amendment, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974). The appellate court also concluded that the Policy Interpretation, because it is a "considered interpretation" of the agency's own regulation, warrants "substantial deference." Cohen, 991 F.2d at 896-7.

As I have discussed above, supra part III.B, this Court is bound by the law of the circuit. As a result, this Opinion and Order must accord controlling weight to the regulations and substantial deference to the Policy Interpretation. However, I revisit the issue of deference in order to address defendants' position that the First Circuit did not have the benefit of newly developed arguments and information or that "no court has carefully examined the issue of the degree of deference, if any, to which the OCR's Policy Interpretation and Investigator's Manual are entitled." Defs.' Post-Trial Mem. at 25.[27]

It is well-settled that where Congress has expressly authorized an agency to issue regulations, those agency regulations are binding on the courts "unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). See also National Latino Media Coalition v. F.C.C., 816 F.2d 785, 788 (D.C. Cir. 1987) (stating that "[w]hen Congress delegates rulemaking authority to an agency,

[27] Because I do not rely on the Investigator's Manual, except to refute an incorrect reliance upon it, see infra note 51, I decline to address specifically the degree of deference to which this document is entitled.

and the agency adopts legislative rules, the agency stands in the place of Congress and makes law").

Here, Congress explicitly delegated rulemaking authority to DED, see supra note 23, stating:

> The Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Javits Amendment, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974). This delegation of authority specifically directed DED to include within its intercollegiate athletic regulations "reasonable provisions considering the nature of particular sports." Thus, Congress included within its conferral of rulemaking authority a specific directive with respect to the intercollegiate athletic regulations; this directive mandates the inclusion of one particular subject but does not otherwise limit the broad scope of authority delegated to the agency.

The agency's regulations were duly approved by President Ford in 1975. This approval was required by Title IX itself, which provides that no "rule, regulation, or order" an agency is empowered to enact pursuant to Title IX shall become effective unless and until approved by the President. 20 U.S.C. § 1682. The

regulations, which were designed to address extensive evidence of sex discrimination in intercollegiate athletics, clearly meet the Chevron standard; they are not arbitrary, capricious or manifestly contrary to Title IX. Kelley, 35 F.3d at 270.

An agency's interpretation of its own regulations, while not given the force of law, is entitled to substantial deference. Lyng v. Payne, 476 U.S. 926, 939 (1986) (citations omitted). See also Udall v. Tallman, 380 U.S. 1, 16 (1965) (noting that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"). The Supreme Court explained its reasoning for this conclusion in Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 151 (1991) (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 556, 558 (1980)):

> Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.

Thus, for all practical purposes, an agency's interpretation of its own regulations is accorded the force of law unless such interpretation is clearly erroneous or inconsistent with the regulation. United States v. Larionoff, 431 U.S. 864, 872 (1977) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945)). See also McCuin v. Secretary of Health and Human Servs., 817

F.2d 161, 168 (1st Cir. 1987) (the interpretation "must be reasonable in view of the language of the regulations and the policies they were meant to implement").

As the First Circuit has held, the Policy Interpretation should be given substantial weight. Cohen, 991 F.2d at 896-97. The Policy Interpretation is a "considered" document: the original draft of the Policy Interpretation was published for public comment, the agency received over 700 comments, and agency staff visited eight universities to evaluate how the Policy Interpretation and other alternatives would be applied in practice. 44 Fed. Reg. at 71,413. Cf. Udall, 380 U.S. at 17 (noting with approval that the agency's interpretation had been a matter of public record and discussion). In addition, since publication of the Policy Interpretation, Congress has had the opportunity to disapprove of the Policy Interpretation, see Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988); however, Congress instead chose to reaffirm its intent that Title IX's prohibition against discrimination be broadly construed. See Cohen, 991 F.2d at 894 (recognizing that record of the floor debate on Restoration Act "leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes") (citations omitted). Cf. North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 535 (1982) (where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then

presumably the legislative intent has been correctly discerned") (citations omitted).

Defendants dispute the First Circuit and this Court's determination of the degree of judicial deference appropriately accorded to the agency's regulations and interpretations. They argue that the agency exceeded its delegated rulemaking authority, and that the documents are therefore "interpretive" rather than "legislative." Defendants argue that the rulemaking authority Congress delegated to the agency was limited by the Javits Amendment to provisions concerning the nature of particular sports. Thus, defendants conclude that to the extent the regulations went beyond that specific directive they are "interpretive" rather than "legislative" and are thus entitled to the less deferential standard of review articulated in the germinal cases Skidmore v. Swift & Co., 323 U.S. 134 (1944) and General Electric Co. v. Gilbert, 429 U.S. 125 (1976). Defendants' reliance on Skidmore and Gilbert is misplaced because these cases concern agency guidelines issued in the absence of an explicit Congressional delegation of authority. Here, however, Congress did authorize the agency to promulgate regulations implementing Title IX. This Court is persuaded that "the directive that those regulations 'include reasonable provisions considering the nature of particular sports' does not limit the scope of the delegation; it merely compels the agency to include such provisions in its broader regulatory framework." Proposed Findings of Fact and Conclusions of Law of Pls. at 28. As I noted above, these regulations must therefore be given

controlling weight. Similarly, the Policy Interpretation was issued as a result of the duly delegated rulemaking authority entrusted to the agency, and is therefore entitled to substantial deference. Cf. Martin, 499 U.S. at 151 (where the Court acknowledged that an agency's power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers).

Defendants further contend that the Policy Interpretation, because it was never approved by the President, does not have the binding effect of "rules, regulations, or orders" authorized by 20 U.S.C. § 1682. The Policy Interpretation, however, is not a rule, regulation, or order, but is a guideline designed to interpret a rule, regulation, or order, namely, the agency's own regulations published at 34 C.F.R. § 106. The Policy Interpretation therefore need not be approved by the President in order to become effective.

In sum, this Court must abide by the Policy Interpretation unless it is clearly erroneous or inconsistent with the regulations. See Larionoff, 431 U.S. at 872. Defendants protest that the Policy Interpretation contravenes the intent of Title IX in at least two respects. First, they claim that the Policy Interpretation, as interpreted by this Court, renders Title IX an affirmative action statute, in derogation of Title IX, which specifically provides that it shall not be interpreted to require preferential or disparate treatment to members of one sex. 20 U.S.C. § 1681(b). This claim, however, is premised on a misunderstanding of the Policy Interpretation. The Policy Interpretation's three prong test does

not mandate statistical balancing. In fact, the test is designed to avoid an absolute requirement of numerical equality. Where substantial proportionality has not been achieved (prong one), an institution must be found in compliance if it demonstrates that it has a continuing practice of expanding the athletic opportunities of the underrepresented sex (prong two) or if its existing program fully and effectively accommodates the interests and abilities of the underrepresented sex (prong three). Kelley, 35 F.3d at 271. Thus, the test encourages equality but recognizes that some institutions may be unable to attain this goal through no fault of their own; in these cases, the test provides alternatives to statistical parity.

Second, defendants claim that OCR ignored the Javits Amendment's instruction to consider the nature of particular sports in drafting reasonable provisions with respect to intercollegiate athletics. "[D]ue to the nature of particular sports, there are upwards [of] 150 to 175 . . . participation opportunities for men (on football, wrestling, lacrosse and the like) that cannot be available to women." Defs.' Post-Trial Mem. at 27. On the contrary, the Policy Interpretation does consider the nature of particular sports. For example, it permits the operation of separate teams for members of each sex and does not require a school to sponsor a women's team for every men's team offered and vice versa. In addition, it recognizes that different expenditures on men's and women's sports may be permissible if based on factors inherent to the operation of specific sports. The fact that the Policy Interpretation does not

consider and accommodate the nature of different sports in the precise manner advocated by defendants does not render it unreasonable. See Cohen, 991 F.2d at 899.

VI. LEGAL ANALYSIS

A. The Three Prong Test

The plaintiffs contend that the Brown athletic program is in violation of the "Equal Opportunity" provision of the Title IX athletics regulations. Therefore, I focus my analysis on the Policy Interpretation to "clarif [y] the obligations which [Brown has] to provide equal opportunities in [its] athletic programs." 44 Fed. Reg. at 71,415. I must assess compliance by looking to the regulations applicable in this case. These regulations, as noted above, are: 34 C.F.R. § 106.37(c) (distribution of athletic scholarships--not applicable to this case), 34 C.F.R. § 106.41(a) and (b) (general non-discrimination pronouncement but allowing for separate teams--not at issue in this case), and 34 C.F.R. § 106.41(c) (requiring institutions to provide equal opportunity to both sexes in athletics programs offered, and listing ten factors for consideration in assessing compliance). The subject of this lawsuit is whether or not Brown complies with the "Equal Opportunity" provision found at 34 C.F.R. § 106.41(c). Litigation has primarily focused on the first of the ten "equal opportunity" factors which asks "whether the selection of sports and levels of competition effectively accommodate the interest and abilities of members of both sexes." 34 C.F.R. § 106.41(c)(1).

Determining compliance with this factor requires application of the Policy Interpretation's three prong test, recited supra part IV.C, which delineates the standards for enforcement of 34 C.F.R. § 106.41(c)(1). Because the proper interpretation of the three prong test is the most hotly contested legal issue in this case, I will extensively analyze and address the relevant arguments presented by the parties.

1. Prong One

An institution complies with the three prong test if it meets prong one of the analysis and no other. Plaintiffs bear the burden of proving that the institution does not satisfy prong one. Prong one asks:

> Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments . . .

44 Fed. Reg. at 71,418. I conclude that an institution satisfies prong one provided that the gender balance of its intercollegiate athletic program substantially mirrors the gender balance of its student enrollment. "Thus, a university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." Cohen, 991 F.2d at 897-98. I now discuss the meaning of three contested elements of prong one.

a. Intercollegiate Level Athletics

The Policy Interpretation expressly states that it is intended to apply to intercollegiate athletics.[28] It explains, however, that because the regulations distinguish between club sports and intercollegiate sports, "under this Policy Interpretation, club teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition." 44 Fed. Reg. at 71,413 n.1. It was not seriously contended until the eleventh hour, nor did the evidence show, that any of Brown's club teams should be considered to be presently operating as intercollegiate teams under this definition.[29] Therefore, I

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[28] However, "its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation." 44 Fed. Reg. at 71,413. Here, plaintiffs have not challenged Brown's non-varsity programs.

[29] For the majority of the trial, defense counsel represented that intercollegiate athletic participation opportunities at Brown relate only to university-funded and donor-funded varsity teams. Trial Tr. 11/1/94 at 89.

The testimony later offered in support of the position that some of the club teams engage in "intercollegiate competition" was given by Brown's Assistant Athletic Director, Jeffrey Ward. Conceding his uncertainty, he testified that he believed that the following club teams might engage in substantial competition with varsity teams at other colleges: women's water polo, women's soccer, women's skiing, women's and coed sailing, and men's skiing. Trial Tr. 12/8/94 at 139-40. However, in addition to being unable to ascertain from the record which of the clubs' competitors were varsity teams, this Court has no way of determining the number of participants (with the exception of women's water polo) on each of these club teams. As Brown acknowledged in its answer to plaintiffs' interrogatories, club team rosters are not maintained

do not treat any of Brown's club programs as intercollegiate teams under prong one. On the other hand, Brown's donor-funded varsity teams resemble university-funded varsity teams in some aspects and club teams in others. See supra notes 6-13 and accompanying text. Thus, the question arises whether donor-funded teams may be considered to be "intercollegiate" teams for the purposes of prong one.

It is evident that Brown's donor-funded teams operate at a disadvantage in comparison to its university-funded varsity teams.[30] The issue with regard to

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by either the athletic department or the student activities office. Pls.' Ex. 1 at 6-7.

[30] While both men's and women's teams at the donor-funded level may operate at a disadvantage compared to university-funded teams, the burden of this status falls more heavily on women's teams. There was ample testimony that women's teams are less able than men's teams to raise necessary funds from private donations. Although defendants attributed this fund raising disparity to lack of effort on the part of women's coaches and teams, I find Coach Robert Rothenberg's explanation more persuasive. As head coach of both the men's and women's track teams, he testified that he and his staff worked equally hard to raise money for both teams but were never able to raise as much money on behalf of the women's team as they were able to raise for the men's team. He attributed this disparity to the financial bases available and to traditional patterns of giving, stating:

> [The] women's track and field program at Brown started about 1978, the men's started about a hundred years before. When you look at the giving, you are not going to get major contributions [from] men or women that are in their twenties or thirties. Your biggest contributions will come from people that have raised their children, that are out, that have accumulated some money and are looking for [a] way to [give] back to the university in the sport that he or she participated in. I think traditionally men have probably

funding sources is not where the funding comes from but the extent to which funding comes at all to donor-funded teams. Donor-funded teams generally have much less money, have no commitment from the university that the team will be supported in a year when fund raising efforts are less successful, and must expend gift funds for privileges that Brown provides to university-funded teams at no cost to those teams. As a result of their unfunded status, most of the donor-funded teams are prevented from reaching their full athletic potential.[31] However, the evidence presented at trial suggests that, on the whole, Brown's donor-funded teams do engage in "varsity level" competition. Thus, I treat both donor-funded and university-funded

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controlled more of that money available in families. But for whatever the reason, there's a tremendous difference in the ability to fund raise for men and for women and I've been doing [it] for 13 years.

Trial Tr. 12/1/94 at 188-89.

[31] Kim Havell, the 1994-95 women's ski team captain illustrated this point:

Q: Have you enjoyed all of the aspects of competing to become a top-flight women's ski program at Brown?

A: I would say no to that in the sense that it's been a lot of--it's hard to get everything together. Every year the captains have to put in a lot of work to make sure everyone knows when the races are, when we have to meet. All the details we have to worry about too, the team members have to consider. And it's not just set up, you go, you do the best you can[. Y]our mind is on the duties you have to the team, not just on competing and doing the best that you can.

Trial Tr. 9/29/94 at 75.

varsity teams as intercollegiate teams but as positioned at distinct levels within the athletic hierarchy.[32]

b. Substantially Proportionate

The phrase "substantially proportionate" is necessarily an elusive concept. Consequently, I turn toward other factors to inform my interpretation of this term. Because a positive showing on prong one terminates the inquiry, providing a "safe harbor" for the institution, Cohen, 991 F.2d at 897, logic suggests that "substantially proportionate" must be a standard stringent enough to effectuate the purposes of the statute. At the same time, "substantially proportionate" accounts for the possibility of minor fluctuations in the

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[32] The Policy Interpretation applies separately to each level of athletic program within an institution. The Policy Interpretation states that it "is designed specifically for intercollegiate athletics, however its general principles will often apply to club, intramural, and interscholastic athletic programs. . . ." See 44 Fed. Reg. at 71,413. Brown's unusual two-tiered treatment of its varsity program defies easy categorization. Because Brown has created another layer of athletic offerings, it is arguable that this Court should assess compliance by independently applying the Policy Interpretation to each tier of its intercollegiate varsity program. This method would give effect to the "Overall Determination of Compliance" element of the Policy Interpretation's "Effective Accommodation" provision. See 44 Fed. Reg. at 71,418 (asking "[w]hether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity"). See supra part IV.C.

I have chosen not to adopt this method; however, I note that the factual record could only support a finding of noncompliance pursuant to this alternative application.

undergraduate population and in the athletic program from one year to the next. Thus, substantial proportionality is properly found only where the institution's intercollegiate athletic program mirrors the student enrollment as closely as possible. This definition takes into account any small variations that are beyond the institution's ability to control or predict.

Defendants argue that "substantially proportionate" must be interpreted very liberally, in favor of the institution, lest a sudden surge in numbers on one team propel a complying institution into violation.[33] Defendants emphasize that the gender composition of the athletic program is both unpredictable and out of Brown's control, asserting that "Brown is stuck with whomever shows up on campus." Trial Tr. 12/16/94 at 61. This position ignores several significant facts. First, prong one compliance is assessed by comparing the gender ratio of the student enrollment with the gender ratio of the entire intercollegiate athletic program. It is unlikely that numerical fluctuations on an individual team will significantly alter the gender ratio of any sizable athletic program. In fact, testimony in the trial revealed that the fluctuations, from year to year, of the gender balance in the athletic program at Brown were minimal. Second, this position fails to acknowledge that when significant numerical changes did occur in

[33] "[T]hink of the university that in one year has 54 men track participants and in year two has 70 men's track participants. Does that mean that [the athletic director] has to wave a magic wand over the athletic department and create a new team of 16 women?" Trial Tr. 12/16/94 at 52.

the intercollegiate athletic program as a whole, these changes were within the control of the University. Plaintiff's expert, Dr. Christine Grant, Athletic Director for the women's program at the University of Iowa and a former official of a number of collegiate athletic associations, testified persuasively that a university "predetermines" the approximate number of athletic participants and the male to female ratio. I conclude that Brown does predetermine the gender balance of its athletic program through the selection of sports it offers (some sports, by their nature, require more players), the size of the teams it maintains (as dictated by each coach's preference), the quality and number of coaches it hires, and the recruiting and admissions practices it implements. Cf. Prelim. Inj. Hr'g Tr. 10/26/92 at 20. For example, coaches at Brown acknowledged the prominent role recruiting plays in sustaining Brown's varsity athletic program. Most coaches testified that they determine an ideal team size and then recruit the requisite number of athletes to reach that goal. Because recruits constitute the great majority of athletes on nearly all of Brown's university-funded varsity teams, the University should not have been surprised by the gender mix of interested athletes on campus.[34]

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[34] At the preliminary injunction hearing, John Parry, Brown's Athletic Director from January 1979 to January 1990, was asked, "When you were at Brown, was it true, in your view, that Brown's activities effectively did predetermine the percentage of--the percentage of men and women participating in intercollegiate athletics?" He responded, "Yes." Prelim. Inj. Hr'g Tr. 10/27/92 at 130.

c. Participation Opportunities

The First Circuit, in sustaining the preliminary injunction, did not define the term "participation opportunities" as set forth in prong one of the Policy Interpretation. It now rests upon me to formulate a definition. For the purposes of the three prong test, I hold that the "participation opportunities" offered by an institution are measured by counting the actual participants on intercollegiate teams. The number of participants in Brown's varsity athletic program accurately reflects the number of participation opportunities Brown offers because the University, through its practices "predetermines" the number of athletic positions available to each gender.[35] In addition, as

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[35] Brown argues that under this "predetermination" analysis it is inconsistent to find that there are club team members who are interested and able to compete at the varsity level. If only recruited athletes have the ability to compete at the Division I varsity level for the purposes of prong one, defendants argue, plaintiffs cannot at the same time maintain that non-recruited club team athletes have the ability to compete at the varsity level for the purposes of prong three. Defs.' Reply Br. at 4.

Defendants err in conflating the analyses of prong one and prong three. Under prong one, the ability of recruited athletes is relevant only because Brown effectively limits participation on its varsity teams to recruited athletes, which in turn logically requires this Court to equate "participation opportunities" with actual participation rates, for the purposes of prong one. It is not the position of this Court that only recruited athletes could compete on Brown's varsity teams, rather the evidence has demonstrated that it is in fact the practice at Brown to rely almost exclusively on recruited athletes to field varsity teams. Under prong three, the ability of club athletes is a factor of the test itself, but the standard of prong three is generous: the underrepresented sex need only demonstrate the interest and ability to

noted below, any other measure of participation opportunities is infeasible. While the First Circuit did not explicitly define "participation opportunities" as participation rates, it implicitly adopted and applied this definition in its prong one analysis.

Defendants contend, however, that the concept "participation opportunity" carries a very different practical meaning from the simpler concept of "participation." They argue that the intercollegiate athletic participation opportunities offered at Brown should be measured by counting each team's filled and unfilled athletic slots.[36] The defendants offer several methods of determining the exact number of slots that they contend are available but unfilled.

First, Brown proposes that participation opportunities should include those additional athletic slots that women's team coaches testified they were able to support, given current resources. This method is flawed because many coaches, while technically able to support more team members, restrict their team size according to their personal coaching philosophies. Thus, these theoretical opportunities are not actually

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compete in an "intercollegiate schedule" as defined in the Policy Interpretation. See 44 Fed. Reg. at 71,413 n.1. A club team can demonstrate the interest and ability to compete in an "intercollegiate schedule" without presently operating at the same level of competitiveness maintained by longstanding university-funded Division I varsity teams.

[36] I have found that Brown "predetermines" the approximate number of varsity positions available to men and women; the concept of any measure of unfilled but available athletic slots does not comport with reality.

available to athletic hopefuls.[37] I also note that even if I were to accept this definition of participation opportunities, or any other measure of "unfilled but available" positions, I would be compelled to compare the women's and the men's theoretically available additional spots.

Second, Brown asserts that each team is necessarily capable of carrying, at a minimum, the number of athletic positions it has supported in recent history. They contend that each team therefore affords at least that number of opportunities to participate, even during years in which the actual participation rates fall short of their historical high. I must reject the assertion that peak numbers achieved during some year in the past are the most accurate measure of participation opportunities presently offered by an institution.[38]

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[37] Under the same rationale, it is incorrect to equate participation opportunities with the number of athletes permitted to travel with the team to "away" games, as determined by the NCAA, because Brown does not require coaches to maintain their teams at travel squad size. Thus, I reject Brown's proposal to measure participation opportunities by NCAA team travel squad sizes.

[38] A number of factors support this conclusion. First, Brown conceded that each coach employs his or her own philosophy in limiting team size. Because a current coach may make adjustments in his or her coaching practices over the years, and because a newly hired coach may implement different governing policies from that of a predecessor, only the current team size accurately reflects the number of participation opportunities actually offered to students. For instance, although previous swimming coaches had maintained a team with as many as 36 members, the new head coach of men's swimming testified that he did not plan to coach such a large team. Trial Tr. 12/8/94 at 114.

Numbers from the current or most recent, complete competitive season provide the most representative quantification of participation opportunities presently offered.

Third, in the alternative, Brown contends that each women's team for which there is an "equivalent" men's team is by definition able to carry at least the number of athletic positions carried by its counterpart in the men's program. Brown maintains that each women's team, therefore, affords at least as many participation opportunities as its "matching" men's team. I decline to adopt this methodology. It is not immediately apparent why the size of men's teams should set the standard for women's team sizes. Nor does the evidence presented at trial justify this approach. Men's and women's teams of the same name are sufficiently distinct from one another to invalidate any approach that rests upon an assumption of similarity.[39] I

Second, the coaches' testimony demonstrated that the number of positions open to newcomers in any given year depended upon the number of members expected to graduate, the strength of the existing team, and the abilities of the prospective athletes. Because these latter variables may change team size slightly, team numbers from past years may not be a reliable indication of current participation opportunities.

[39] Although many men's and women's teams share the same name, they may not require the same number of team members in order to compete effectively. Different rules of play, including but not limited to, rules of substitution, amount of contact permitted, size of field, and number of specialized positions involved determine appropriate team size. For example, Dr. Donna Lopiano, Executive Director of the Women's Sports Foundation, and an accomplished four sport athlete honored in the softball hall of fame, discussed some of the differences between baseball and softball:

conclude that intercollegiate "'[a]thletic opportunities' means real opportunities, not illusory ones," Horner, 43 F.3d at 274 (quoting Williams v. School Dist. of Bethlehem, 998 F.2d 168, 175 (3d Cir. 1993)), and therefore should be measured by counting actual participants.

Finally, defendants offer an independent interpretation of the meaning of "participation opportunities" in the context of prong one. They define a participation opportunity as a chance for an interested person to participate. Defendants contend that where the student body is comprised of equal numbers of men and women, equality means "offering" the chance to participate in athletics to an equal number of men and

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> I think softball and baseball are two completely different sports, that baseball will have a larger team size than softball will primarily because of the [effect of] pitching. It is typical on a baseball team to carry anywhere from six to ten pitchers because of the stress that is involved in throwing a baseball. . . . [I]n the sport of softball a single pitcher can pitch 44 consecutive innings, and I have done so on a number of occasions, without any stress on the shoulder joint because your arm is closer to your body and in a much more well supported position when you're throwing the ball. Where a baseball pitcher typically cannot throw more than 11 or 12 innings at a time and needs two or three days rest to recover. So just that factor alone will result in participation differences of 10 to 20 percent on the size of a baseball to the size of a softball team.

Trial Tr. 12/2/94 at 14-15. See also Trial Tr. 9/27/94 at 39 (men's and women's fencing coach testifying that women fence in only one weapon [and now in two] whereas men fence in three, thus resulting in many more positions available for men on a fencing team).

women.[40] They postulate that if students were offered a hypothetical opportunity to participate, the students would actually participate in varsity athletics in accordance with the relative interest of their respective genders. Thus, where the gender ratio of a university's interested student population is substantially proportionate to the gender ratio of its athletic program, it may be assumed that men and women in the student body were "offered" an equal "opportunity" to participate. Therefore, defendants claim, Brown provides equal "participation opportunities" if the ratio of men to women among varsity athletes is substantially proportionate to the ratio of men to women among students interested in participating in varsity athletics. Defendants conclude that, in order to succeed on prong one, plaintiffs bear the burden of proving that the percentage of women among varsity athletes is not substantially proportionate to the percentage of women

[40] Defendants explain their theory with a hypothetical. In this hypothetical, there are 1000 men and 1000 women in the student body at a university that has 150 gender-neutral athletic slots available. 500 men and 250 women in the student body (50% of men enrolled and 25% of women enrolled) are interested in filling these spots, and a random lottery is conducted in which students are offered a guaranteed position on the team. Where equal numbers of randomly selected men and women are offered such an opportunity, 50% of the men and 25% of the women will accept. Thus, although equal numbers of men and women are offered a position, 100 men and 50 women, due to the relative interest of their gender, will fill the 150 slots. See testimony of Dr. Finis Welch, Trial Tr. 11/22/94 at 13-15 and 19-24.

among students interested in participating in varsity athletics.[41]

Defendants, through their expert Dr. Finis Welch, a prominent labor economist, borrow from Title VII employment discrimination jurisprudence. There, the relevant comparison is between the qualified applicant pool and the work place demographics, rather than between the population of the United States and the work place demographics. This analogy is the basis for defendants' argument that the relevant comparison in Title IX cases is between the interested potential varsity athlete pool, however defined, and the make-up of Brown's athletic program, rather than between the student enrollment and the athletic program. Comparison to Title VII is inapposite, however.[42] Title VII seeks to determine whether gender-neutral job openings have been filled without regard to gender. Title IX, on the other hand, was designed to address the reality

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[41] At the preliminary injunction stage, defendants similarly sought to make the relative interests of men and women the relevant inquiry. However, at that time, defendants propounded this theory under the authority of prong three. See infra part VI.A.3.a. The First Circuit squarely rejected this analysis with respect to prong three, Cohen, 991 F.2d at 899-900, and I now decline to adopt it with regard to prong one.

[42] Cf. Cohen, 991 F.2d at 902 (rejecting analogy to Title VII with respect to allocation of burden of proof on elements of three prong test and noting the substantial differences between Title IX and Title VII statutory purposes and between the education and employment contexts). The factors articulated by the First Circuit in declining to import Title VII burdens of proof also support my rejection of defendants' attempt to superimpose the meaning of discrimination in Title VII upon the plain language of Title IX.

that sports teams, unlike the vast majority of jobs, do have official gender requirements, and this statute accordingly approaches the concept of discrimination differently from Title VII. Cf. Kelley, 35 F.3d at 270 (stating that "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics") (citations omitted). Title IX establishes a legal presumption that discrimination exists if the university does not provide participation opportunities to men and women in substantial proportionality to their respective student enrollments, unless the university meets one of the two exonerating situations set forth in prongs two and three. See Kelley, 35 F.3d at 271.

Entirely apart from the flaws in the Title VII-Title IX analogy, there are a number of other problems with interpreting prong one to require that a university afford athletic opportunities to men and women in proportion to their relative interests in athletics. Under this Court's interpretation of prong one, concerned parties can assess an institution's compliance simply by comparing the gender ratio of participating athletes with the gender ratio of the student body, both of which are easily ascertained. Under the defendants' theory, a concerned party must undertake a complicated assessment of "interested" students before making any comparisons. Any such assessment will be meaningless since it is an impossible task to quantify latent and

changing interests.[43] Thus, in addition to contravening the plain language of prong one, defendants' interpretation imposes a heavy burden on student-plaintiffs, the courts, and institutions who wish to monitor their own compliance.[44] In any case, it is unclear what population should be surveyed to assess the interest of the "qualified applicant pool," even if it were possible to do so.

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[43] Defendant's distinguished expert, Dr. Finis Welch, acknowledged that there is no single factor by which to measure that degree of athletic interest that will reliably be acted upon when the opportunity is present. "[T]he interest measures that we get vary. I mean there is an overall pattern and they fall within the pattern, but there's--there's no one place that we can go to get a rock solid measure of interest." Trial Tr. 11/29/94 at 115.

Dr. Welch illustrated the difficult in quantifying interest when he was asked by the Court, "[W]hat constitutes an interested man or an interested woman?" Dr. Welch responded, "That's hard. And that's what we're going to do is draw information from various sources, because we don't know." Dr. Welch listed a variety of survey sources and concluded, "I would try to combine the attitudinal information, the survey kind of question with the realization, 'What do I see by way of people showing up.' " Trial Tr. 11/22/94 at 15-17.

[44] Given the difficulty of measuring the relative interests of men and women, it would be almost impossible for an institution to remain in compliance with Title IX by staying abreast of the ever-changing relative "interests" of its male and female students and adjusting its program offerings accordingly. Because defendants' interpretation would require substantial proportionality between the gender balance of its athletic program offerings and the gender balance of interested prospective student-athletes, constant rebalancing would be necessary to maintain compliance, thereby eliminating the ability of an institution to verify easily that it falls within the "safe harbor" that prong one provides.

The possible survey populations range from matriculated students, to all actual Brown applicants, to all academically able potential varsity participants. In an analogy to Title VII and the "qualified applicant pool," defendants argue that the relevant population consists only of those men and women who might be interested and able to participate in varsity athletics. Uninterested and unathletic persons are irrelevant to any assessment of the substantial proportionality between the athletic program and the student enrollment. The question, under defendants' theory, then becomes who belongs to the "qualified applicant pool" from which Brown might draw student-athletes. Each of the possible "pools" from which Brown might draw varsity athletes has inherent theoretical and practical problems as a survey population, which confirms my initial conclusion that defendants' interpretation of prong one is incorrect. I will now discuss each of the possible survey pools.

(i) Matriculated Students

Because Brown, as a Division I school, actively recruits nationwide most of the students who play on its varsity teams, the survey population of potential participants must be broader than the pool of matriculated students. What students are present on campus to participate in a survey of interests has already been predetermined through the recruiting practices of the coaches. What teams are established and can recruit or qualify for admissions preferences has already been predetermined by Brown. Thus, the interest present on

campus is controlled by Brown; to then suggest that Brown must only satisfy the relative interests of students present on campus is circular.

(ii) Actual Brown Applicants

Defendants have suggested that an appropriate survey population might consist of all students who applied to Brown. They claim that several already existing questions on Brown's application would provide an easy determination of the relative interests in varsity athletics. There are two problems with using this group of students as the determinative "pool." First, it revisits the conceptual problems inherent in attempting to measure "interest." See supra note 43. It cannot be true that questions on Brown's application provide a reliable measure of interest that will be acted upon given the opportunity.[45] Although many women who later committed to attend Brown expressed some type of interest in sports at the time of application, far fewer actually participate in Brown's intercollegiate athletic program.[46] Second, using the pool of actual Brown

[45] Question 9 on the application form asked applicants to list activities that they might pursue at Brown. Pls.' Ex. 112. Dr. Welch acknowledged that the answers to question 9 could not be used to measure precisely those interested in participating in varsity athletics, as opposed to club, intramural, and recreational sports. Trial Tr. 11/29/94 at 114-15.

[46] As Dr. Welch noted in his report:

> The fact that only small minorities of those indicating interests actually participate in varsity sports is indicative that reported interests are not necessarily firm commitments. These numbers suggest that applicants

applicants fails to consider the fact that college applicants interested in a sport not offered as a varsity sport at Brown may not even apply to Brown. A survey of actual Brown applicants would thus fail to capture the interest of those student-athletes who choose not to apply due to the limits of Brown's program offerings. To suggest that Brown need only satisfy the interests of actual applicants where Brown's selection of program offerings affects who applies to the school in the first place is illogical.

(iii) Academically Able Potential Varsity Participants

If one were to accept the defendants' analogy to the "qualified applicant pool" of Title VII, the most appropriate survey population would consist of all academically able potential varsity participants. The "qualified applicant pool" for Brown, as a Division I institution, would consist of all prospective college applicants who might apply to or be recruited by Brown if Brown offered their preferred varsity sports. Because Brown seeks athletic recruits from across the nation, the difficulties in identifying all such persons in order

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> expressing potential interests in participating should be viewed as a mixture consisting of some who are seriously committed to participating and others who are, perhaps, not as committed. The alternative treatments of these groups can result in major shifts in calculated female/male interest ratios.

Defs.' Ex. IIIII, Table 30A at 92.

to construct a representative survey population may be insurmountable.

In addition, even a successful survey of all academically able potential Brown applicants could not accurately measure interest in certain sports, crew, for example, that commonly develop only after matriculation. Nor can a survey of this population account for the extent to which opportunities drive interests. See, e.g., testimony of Dr. Welch, Trial Tr. 11/29/94 at 92 (question asking, "Would you agree with the following statement? If Brown provides far more opportunities for women, then maybe the percentage of interested women will rise?" and witness replying, "Sure, I don't see anything wrong with that").

For all the foregoing reasons, I reject defendants' alternative interpretation of prong one.

Under the Policy Interpretation, an institution may fail to provide participation opportunities substantially proportionate to student enrollment but still comply with the Title IX regulatory scheme. The Policy Interpretation recognizes that a school might make every attempt to accommodate women's interests and abilities and still not achieve substantial proportionality. Therefore, an institution is permitted to maintain an athletic program that provides substantially more opportunities to students of one gender than to the other if it comports with one of the two other prongs. In this way, the Policy Interpretation accommodates the equal opportunity mandate of Title IX without requiring strict quotas.

2. Prong 2

In the event that an institution fails prong one, it can still prevail by demonstrating compliance with prong two. Defendants bear the burden of proof on prong two, which asks:

> Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex . . .

44 Fed. Reg. at 71,418. Prong two illustrates that "Title IX does not require that the university leap to complete gender parity in a single bound." Cohen, 991 F.2d at 898. However, it does require an institution to demonstrate that it has continued to increase the number of athletes participating in intercollegiate athletics. An institution does not demonstrate "program expansion" by reducing men's teams so as to increase the relative percentage of female participation in intercollegiate athletics, although it may achieve compliance with prong one if it sufficiently reduces the program of the overrepresented gender. See Roberts, 998 F.2d at 830 (stating that "the ordinary meaning of the word 'expansion' may not be twisted to find compliance under [prong two] when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs").

3. Prong 3

Even where plaintiffs can prove that an institution does not offer intercollegiate athletic participation opportunities to men and women in substantial proportionality to their respective enrollments (prong one), and where defendants are unable to demonstrate a history and continuing practice of program expansion (prong two), plaintiffs must additionally prove that an institution does not satisfy prong three. Prong three asks:

> Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418. Prong three "requires a relatively simple assessment of whether there is unmet need in the underrepresented gender that rises to a level sufficient to warrant a new team or the upgrading of an existing team." Cohen, 991 F.2d at 900. Thus, provided that athletes of the underrepresented gender have both the ability and interest to compete at the intercollegiate level, they must be fully and effectively accommodated. Of course, institutions do retain discretion when met with requests for the creation of a new team or the upgrading of an existing team. They need not upgrade or create a team where the interest and

ability of the students are not sufficiently developed to field a varsity team. Further:

> [i]nstitutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions.

44 Fed. Reg. at 71,418. Thus, defendants' concern that the Court's interpretation of prong three would require Brown to "accommodate each and every expressed student interest as long as there [is] any evidence of ability" is not well taken.[47] Defs.' Post-Trial Mem. at 1.

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[47] Defendants colorfully illustrated this concern in their closing statement: "I can go onto any campus in this country, Your Honor, and probably find somebody interested in playing Russian roulette. That doesn't mean that that's an unmet need that ought to be raised to the dignity of an intercollegiate varsity." Trial Tr. 12/16/94 at 71. This portrayal of the practical consequences of this Court's interpretation fails to acknowledge the safeguards embodied in the Policy Interpretation as a whole. An institution is not required to create or elevate a team in the absence of the reasonable expectation of intercollegiate competition within the institution's normal competitive region. 44 Fed. Reg. at 71,418. It follows that there must be both a sufficient number of other teams competing in that region to provide intercollegiate competition and enough interested and able individuals for the institution to draw upon and build a competitive team. But see 44 Fed. Reg. at 71,418 (institutions may be required by Title IX regulations to "actively encourage" the development of such competition). As plaintiffs noted in their closing statement: "We represent a class. We don't represent any one individual and [we don't say] this person alone needs this opportunity. If you provide equal opportunities to the class members, to the potential athletes, we're satisfied even

a. Full and Effective Accommodation

Defendants press their interpretation of prong three, originally presented at the preliminary injunction stage of this litigation. Their position is that "to the extent students' interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the school's response is in direct proportion to the comparative levels of interest." Cohen, 991 F.2d at 899. In other words, Brown argues that it may accommodate less than all of the interested and able women if, on a proportionate basis, it accommodates less than all of the interested and able men.[48] This is simply not the law. This Court and the First Circuit previously rejected defendants' interpretation of prong three for a number of reasons that still hold true today. Just as with prong one, defendants' theory is inconsistent with the law, is poor policy, and presents a logistical quagmire.

First, as the First Circuit detailed:

> We think that Brown's perception of the Title IX universe is myopic. The fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a

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though one athlete here or one athlete there is disappointed." Trial Tr. 12/16/94 at 34.

[48] Thus, for example, under defendants' interpretation, where a school with a student enrollment of 1000 men and 1000 women has 500 interested men and 250 interested women, the school satisfies prong three if it provides 100 athletic positions for men and 50 for women. Contra Cohen, 991 F.2d at 899.

shortfall in the provision of opportunities for the underrepresented gender. . . .

In the final analysis, Brown's view is wrong on two scores. It is wrong as a matter of law, for DED's Policy Interpretation, which requires full accommodation of the underrepresented gender, draws its essence from the statute. Whether Brown's concept might be thought more attractive, or whether we, if writing on a pristine page, would craft the regulation in a manner different than the agency, are not very important considerations. . . .

Brown's reading of Title IX is legally flawed for yet another reason. It proceeds from the premise that the agency's third benchmark countervails Title IX. But, this particular imprecation of the third benchmark overlooks the accommodation test's general purpose: to determine whether a student has been "excluded from participation in, [or] denied the benefits of" an athletic program "on the basis of sex . . . " 20 U.S.C. § 1681(a). While any single element of this tripartite test, in isolation, might not achieve the goal set by the statute, the test as a whole is reasonably constructed to implement the statute. . . .

As it happens, Brown's view is also poor policy, for, in the long run, a rule such as Brown advances would likely make it more difficult for colleges to ensure that they have complied with Title IX. Given that the survey of interests and abilities would begin under

> circumstances where men's athletic teams have a considerable head start, such a rule would almost certainly blunt the exhortation that schools should "take into account the nationally increasing levels of women's interests and abilities" and avoid "disadvantag[ing] members of an underrepresented sex . . . " 44 Fed. Reg. at 71,417.
>
> Brown's proposal would also aggravate the quantification problems that are inevitably bound up with Title IX.[49] Student plaintiffs, who carry the burden of proof on this issue, as well as universities monitoring self-compliance, would be required to assess the level of interest in both the male and female populations and determine comparatively how completely the university was serving the interests of each sex. . . .
>
> Furthermore, by moving away from OCR's third benchmark, which focuses on the levels of interest and ability extant in the student body, Brown's theory invites thorny questions as to the appropriate survey population, whether from the university, typical feeder schools, or the regional community.[50] In that way, Brown's proposal would do little more than overcomplicate an already complex equation.

Cohen, 991 F.2d at 899-900. Thus, as the First Circuit found, Brown's interpretation is logistically difficult to

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[49] See supra note 44 and accompanying text.

[50] See supra note 43 and accompanying text.

administer and is inconsistent with the effective accommodation mandate of the Title IX implementing regulations in two respects. It both contravenes the plain meaning of prong three and ignores the Policy Interpretation's directive that an institution determine the athletic interests and abilities of students in such a way as to "take into account the nationally increasing levels of women's interests and abilities" and avoid disadvantaging members of an underrepresented sex. 44 Fed. Reg. at 71,417. Brown's interpretation disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests.

Additionally, the trial on the merits illustrated some of the practical and conceptual difficulties identified above by the First Circuit. Although the plaintiffs bear the burden of proof on prong three, the defendants introduced a great deal of evidence in support of their position that Brown satisfies prong three, as they interpret it. Brown conducted a survey on campus, analyzed students' college applications, and assembled a variety of national studies in an attempt to quantify the relative interest of men and women in athletics. Defendants drew from a variety of populations and survey questions, generating scores of measures of what constitutes "interest." Because no one measure and no identifiable population adequately establish relative interest, see supra notes 43-44 and accompanying text, defendants effectively demonstrated how their interpretation of prong three

would impose an insurmountable task on Title IX plaintiffs.[51]

Finally, contrary to defendants' arguments, this Court's interpretation of the three prong test does give

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[51] Contrary to this Court's view of the inherent difficulties with requiring a determination of relative interests, defendants argue that OCR plainly advocates the use of surveys as a simple measure of the relative accommodation of interest and abilities:

> [w]e have looked at what the Office of Civil Rights has instructed us to look at in terms of determining interests and abilities as they change in a university context over time. . . . [I]f any court seeks to give deference to the Office of Civil Rights, it must give deference to how they tell us to determine interest and abilities. . . . And I quote [page 27 of the 1990 Investigator's Manual, which], points out [that] to determine interest and abilities [an institution should look to], quote, "involved club, intramural, feeder school, community, regional, physical education, and other programs." And most importantly, your Honor, they say on page [27], quote, "a survey is mentioned most often since it is usually the simplest method for the institution and O.C.R. to determine interest and abilities."

Trial Tr. 12/16/94 at 85-87. In fact, however, a closer reading of the Athletics Investigator's Manual reveals that OCR identifies surveys as a simple way to identify which additional sports might appropriately be created to achieve compliance. The Manual states on page 27 "[a] survey or assessment may be required as a part of a remedy when OCR has concluded that an institution's current program does not equally effectively accommodate the interests and abilities of students." Valerie M. Bonnette & Lamar Daniel, Department of Education, Title IX Athletics Investigator's Manual 27 (1990). Thus, a survey of interests would follow a determination that an institution does not satisfy prong three; it would not be utilized to make that determination in the first instance.

independent meaning to each component of the test. Defendants posit:

> [T]o suggest that prong one and prong three are the same, that they both require student body ratios is to read prong three out of existence. It becomes redundant. And as the U.S. Supreme Court said in Nordic Village a statute must, if possible, be construed in such a fashion that every word has some operative meaning. For a court to say I have to be at student body ratios in prong one, and for a court to say I also have to be at student body ratios in prong three if I have anybody that's interested on campus, has basically thrown out the raison d'etre for prong three and said we might as well only have a one prong test.

Trial Tr. 12/16/94 at 74-75. This Court's interpretation of prong three does require that the unmet interests and abilities of the underrepresented sex be accommodated to the fullest extent until the substantial proportionality of prong one is achieved. This requirement does not, however, render prong three meaningless. At Brown University the number of interested and able women may match or exceed the number of men participating in the intercollegiate athletic program, thus requiring Brown to achieve substantial proportionality.[52] This depth of athletic talent among the

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[52] In fact, however, plaintiffs did not prove that there are women in addition to those participants in gymnastics, skiing, fencing and water polo who have the interest and ability to compete at the intercollegiate level in a sport for which there is a reasonable expectation of competition in Brown's normal competitive

underrepresented sex may not exist to the same extent at other universities. Thus, while Brown may be unable to justify its program under prong three, because of its wealth of unaccommodated female athletes, other universities may point to the absence of such athletes to justify an athletic program that does not offer substantial proportionality. In this way, the Policy Interpretation gives effect to 20 U.S.C. § 1681(b), see supra part IV.A, and does not, as defendants' argue, impose an affirmative action/quota scheme on institutions receiving federal funds.

VII. APPLICATION

I now turn to the application of the Policy Interpretation to Brown University's athletic program. I will first apply the three prong test to Brown's intercollegiate athletic program pursuant to 34 C.F.R. § 106.41(c)(1) and 44 Fed. Reg. at 71,417-18 ("Effective Accommodation of Student Interests and Abilities"). I will then evaluate the "equal treatment" of Brown's teams by applying the remaining nine factors of the regulation's ten "Equal Opportunity" factors pursuant to 34 C.F.R. § 106.41(c)(2)-(10) and 44 Fed. Reg. at

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region. Even if Brown were to upgrade each of these teams to university-funded status, a 12% disparity would still exist between female participation in intercollegiate athletics and female representation in the student body, resulting in a failure to satisfy prong one. Therefore, it is most likely that even Brown could find that prong three offers protection for its intercollegiate athletic program where prong one does not.

71,415-17 ("Equivalence in Other Athletic Benefits and Opportunities").

A. Prong One Applied

Plaintiffs have proven that Brown does not satisfy prong one. The gender balance of Brown's intercollegiate athletic program is far from substantially proportionate to its student enrollment. As discussed above, Brown University provides 555 (61.87%) intercollegiate athletic opportunities to men and 342 (38.13%) to women, whereas the undergraduate enrollment for the relevant year is 2796 men (48.86%) and 2926 women (51.14%).[53] Brown currently offers 479 university-funded varsity slots for men and 312 university-funded varsity slots for women. It also provides 76 donor-funded varsity slots for men and 30 donor-funded varsity slots for women. Thus, because Brown maintains a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, it cannot gain the protection of prong one. Although Brown clearly does not meet the criteria of the first prong, defendants will still prevail if they can demonstrate that they satisfy the requirements of the second prong or if plaintiffs are unable to meet their burden of proof on prong three.

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[53] As I determined above, see supra part VI.A.1, "intercollegiate athletic participation opportunities" are measured by counting the number of participants on both university and donor-funded varsity teams. In Brown's case, the most accurate, if imperfect, participation numbers appear on the NCAA Squad Lists. See supra note 16 and accompanying text.

B. Prong Two Applied

Although Brown University has an impressive history of program expansion, defendants have failed to demonstrate that the University has maintained a continuing practice of intercollegiate program expansion for women, the underrepresented sex. As I noted at the preliminary injunction stage, Brown substantially expanded its athletic program for women in the 1970s. However, while I recognize that Brown has improved the quality of its women's program, the fact remains that since 1977 only women's indoor track in 1982 and women's skiing in 1994 have been added to its intercollegiate athletic program. Because merely reducing program offerings to the overrepresented sex does not constitute program "expansion," see supra part VI.A.2, the fact that Brown has eliminated or demoted several men's teams does not amount to a continuing practice of program expansion for women. In any case, Brown has not proven that the percentage of women participating in intercollegiate athletics has increased. Since the 1970s, the percentage of women participating in Brown's varsity athletic program has remained remarkably steady. See Cohen, 809 F.Supp. at 991.

C. Prong Three Applied

Prong three would excuse Brown's failure to provide substantially proportionate participation opportunities only if Brown fully and effectively accommodated the underrepresented sex. Here, the

underrepresented sex is women and thus I focus my attention on the extent to which Brown's women athletes are accommodated. I find that Brown has not fully and effectively accommodated the interest and ability of the underrepresented sex "to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes." 44 Fed. Reg. at 71,417.

Plaintiffs have successfully established that Brown has not fully and effectively accommodated the interest and abilities of women, the underrepresented sex at Brown. In its affirmance of this Court's ruling on the preliminary injunction, the First Circuit recognized the potential difficulty in identifying "interest and ability" where student plaintiffs seek the creation or elevation to varsity status of an entirely new team. See Cohen, 991 F.2d at 904. Here, however, plaintiffs have introduced the testimony of student athletes, coaches and experts to verify that at least four existing teams have long been participating in competitive schedules and are capable of competing at Brown's highest varsity level. There are interested women able to compete at the university-funded varsity level in gymnastics, fencing, skiing, and water polo.[54]

[54] The record demonstrates that the women's water polo team has the interest and ability to compete as a university-funded varsity team; however, the evidence does not demonstrate that this club team presently operates as an intercollegiate team. I note that the fact that this team does not engage in prong one's definition of "intercollegiate competition" does not mean that it,

Brown fails to comply with prong three in two respects. First, Brown has failed to increase the number of intercollegiate participation opportunities available to the underrepresented sex where it could do so by elevating a team with demonstrated interest and ability from below intercollegiate status to intercollegiate status. Specifically, I find that Brown has failed to accommodate fully and effectively the underrepresented sex by maintaining women's water polo at club status and by demoting women's gymnastics where these teams have demonstrated the interest and ability to operate as varsity teams. I have already determined that the women's water polo team operates as a traditional club sport rather than as an "intercollegiate" team under the definition of the Policy Interpretation. See supra note 28 and accompanying text. I have also determined that although gymnastics is technically a donor-funded varsity at this time, it will in fact cease to exist, within a few seasons, at an intercollegiate varsity level in the absence of university funding. Neither team can compete as an intercollegiate varsity team if denied university-funded status. See supra part II. Thus, Brown violates prong three by maintaining women's water polo at club status and by, in effect, demoting women's gymnastics to club status, although officially designating it a "donor-funded" varsity team.

Second, Brown has failed to maintain and support women's donor-funded teams at Brown's highest level, thus preventing the athletes on these teams from

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by definition, cannot demonstrate the interest and ability under prong three to do so if upgraded.

developing fully their competitive abilities and athletic skills. Specifically, I find that Brown has failed to accommodate fully and effectively the underrepresented sex by maintaining women's fencing and women's skiing at a donor-funded level where each of these teams has demonstrated the interest and ability to operate as a university-funded varsity team and where donor-funded status has prevented each of these teams from reaching its athletic potential. Even though both athletic tiers offer participation opportunities in Brown's "intercollegiate" program, I have already determined that there are substantial qualitative differences between university and donor-funded teams. The differences preserved by Brown rise to such a level that the women participating on donor-funded varsities are not being fully and effectively accommodated. Thus, Brown violates prong three by maintaining these two women's teams at the donor-funded varsity level.

I recognize that this second basis for finding a violation is a new application of prong three. However, while prong three has not yet been read by any court to require an institution to upgrade any teams from within its intercollegiate athletic program, no other court has been presented with the factual situation of an officially maintained, two-tiered intercollegiate program.

It is true that prong three's "full and effective accommodation" language could be read to require only that an institution elevate or create athletic program offerings for the underrepresented sex from outside of its present intercollegiate program. However, Brown

has created two distinct levels of athletics within the Policy Interpretation's definition of "intercollegiate" athletics; this unique factual situation calls for a more comprehensive interpretation of the "full and effective accommodation" language of prong three. As the First Circuit noted, institutions "must remain vigilant, 'upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex,' [44 Fed. Reg. at 71,418], until the opportunities for, and levels of, competition are equivalent by gender." Cohen, 991 F.2d at 898.

Brown's restructured athletic program cannot be used to shield it from liability when in truth and in fact it does not fully and effectively accommodate the women athletes participating on donor-funded teams. It would circumvent the spirit and meaning of the Policy Interpretation if a university could "fully and effectively" accommodate the underrepresented sex by creating a second-class varsity status. The three prong test establishes a standard of equality that requires Brown to provide substantially equal numbers of intercollegiate athletic opportunities for men and for women, unless Brown either (1) steadily increases the number of such opportunities for women under prong two, or (2) fully and effectively meets the athletic interest and ability of women under prong three such that Brown cannot further improve the athletic opportunities for women until their interest and abilities further develop. Clearly, the potential for athletic development and the level of competition of women's donor-funded

teams are much less than that of university-funded teams; thus, women on the ski and fencing teams can be more fully accommodated within the structure of Brown's established varsity athletic program.

Finally, I note that, in this instance, Brown cannot excuse its failure to accommodate the interest and ability of the women athletes on these four teams by citing an absence of "a reasonable expectation that intercollegiate competition in [these sports] will be available within the institution's normal competitive regions." 44 Fed. Reg. at 71,418. The evidence demonstrates that adequate intercollegiate competition exists within Brown's normal competitive region for each of these four teams.[55]

D. Equal Treatment Factors Applied

There is an additional ground upon which to rest a finding of Title IX violation.

Brown's program offerings, as currently allocated by gender within the two-tiered structure of the intercollegiate varsity program violate the "treatment" aspect of the regulation. See 34 C.F.R. § 106.41(c)(2)-(10) ("Equal Opportunity" factors); 44 Fed. Reg. at 71,415-17

[55] For discussion of Brown's varsity and club competitors in water polo, see Trial Tr. 10/3/94 at 24; Trial Tr. 10/3/94 at 61-2; and Pls.' Ex. 39. For discussion of Brown's varsity and club competitors in skiing, see Trial Tr. 9/28/94 at 29-30; and Trial Tr. 9/29/94 at 12-13. For discussion of Brown's varsity and club competitors in fencing, see Trial Tr. 11/21/94 at 26-29; Trial Tr. 9/27/94 at 8, 76, 78. For discussion of Brown's varsity and club competitors in gymnastics, see Trial Tr. 9/27/94 at 184-86.

("Equivalence in Other Athletic Benefits and Opportunities"). At Brown, far more male athletes are being supported at the university-funded varsity level than are female athletes, and thus, women receive less benefit from their intercollegiate varsity program as a whole than do men from their intercollegiate varsity program as a whole. This inequity is a consequence of the qualitative differences between the benefits enjoyed by university and donor-funded varsity teams. Donor-funded teams are not provided with treatment equivalent to that accorded university-funded teams with regard to at least the following factors: equipment and supplies (§ 106.41(c)(2)), travel and per diem allowance (§ 106.41(c)(4)), opportunity to receive coaching (§ 106.41(c)(5)), assignment and compensation of coaches (§ 106.41(c)(6)), and training services (§ 106.41(c)(8)). See supra notes 6-13, 29-30. These differences were not settled by the parties as to the donor-funded varsity teams since the Settlement Agreement does not resolve any program-wide treatment inequities. Rather, it settles only the relative support afforded to men's and women's university-funded teams as to which there is no dispute concerning their university-funded varsity status.

VIII. REMEDY

Having determined that Brown University is in violation of Title IX, I now address the remedy required. This Court has the authority to mandate specific relief. See Franklin v. Gwinnett County Pub. Sch., 112 S.Ct. 1028, 1035-37 (1992). However, as I stated in my

earlier ruling, I have no desire to "micromanage" Brown's athletic program. Furthermore, I believe that judicial restraint is warranted at this point in light of the wide latitude afforded institutions under the regulations. Title IX does not require an institution to provide any athletic opportunities to its students. What it does require is that an institution provide equal opportunity to both genders in any program it chooses to offer. Thus, "Brown may not . . . operate an intercollegiate program that disproportionately provides greater participation opportunities to one sex in relation to undergraduate enrollments, where there is no evidence of continuing program expansion [for the underrepresented sex] or effective accommodation of the interests and abilities" of the underrepresented sex. Cohen, 809 F.Supp. at 999.

Brown may achieve compliance with Title IX in a number of ways. It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies. I leave it entirely to Brown's discretion to decide how it will balance its program to provide equal opportunities for its men and women athletes. I recognize the financial constraints Brown faces; however, its own priorities will necessarily determine the path to compliance it elects to take.

Defendants frequently raised the specter of being forced by financial constraints to eliminate men's athletic opportunities in order to achieve compliance

under plaintiffs' interpretation of the law. I feel compelled to point out that an institution has much flexibility, even within a finite resource base. Dr. Lopiano was asked whether it would be prudent for a university confronted with severe budgetary constraints to cap the size of men's teams rather than add women's teams to its athletic program. She responded, addressing the false dichotomy posed:

> I believe that philosophically in any case where you have a previously disadvantaged population that you're trying to bring up to snuff to the advantaged population, that it's a bad idea to bring the advantaged population down to the level of the disadvantaged population. [T]he whole idea [of Title IX] is to add participation opportunities for women. And it's unfortunate that across the country that in the name of maintaining the standard of living of football team[s] or the standard of living of one or two special men's sports, that men's sports are being cut and women's gender equity under Title IX [is] being blamed for that.

Trial Tr. 12/2/94 at 59.

Thus, defendants' plea that "[t]here is nothing further Brown can do except cut, cap or eliminate men's teams," Defs.' Post-Trial Mem. at 39, is simply not true. Brown certainly retains the option to redistribute its resources in a way that may slightly reduce the "standard of living" for its university-funded varsity sports in order to expand the participation opportunities for its women athletes and closer approach equal

opportunity between its male and female athletes. Whether it will follow this course of action is, of course, well within its discretion.

IX. CONCLUSION

For all of the reasons stated above, Brown University is in violation of Title IX and supporting regulations.

Brown University is hereby ordered to submit to this Court, within 120 days, a comprehensive plan for complying with Title IX. This portion of the order is stayed pending appeal.

It is hereby further ordered that, in the interim, the preliminary injunction, as outlined in my Opinion and Order of December 22, 1992, Cohen v. Brown Univ., 809 F.Supp. 978, 1001 (D.R.I. 1992), will remain in full force and effect.

SO ORDERED.

/s/ Raymond J. Pettine
Raymond J. Pettine
Senior U.S. District Judge

March 29, 1995

Entered as an Order of this Court March 29, 1995.

/s/ Celeste-Anne Patnaude
Deputy Clerk

Federal Rule of Civil Procedure 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) ***Certification Order.***

(A) ***Time to Issue.*** At an early practicable time after a person sues or is sued as a class representative, the court must determine

by order whether to certify the action as a class action.

(B) ***Defining the Class; Appointing Class Counsel.*** An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) ***Altering or Amending the Order.*** An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) ***Information That Parties Must Provide to the Court.*** The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) ***Grounds for a Decision to Give Notice.*** The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding

that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who

had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) ***In General.*** Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) ***Court Approval Required for Payment in Connection with an Objection.*** Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) ***Procedure for Approval After an Appeal.*** If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days

after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court

sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Title IX, Education Amendments of 1972, 20 U.S.C. § 1681

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply

(A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or

(B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations this section shall not apply to membership practices -

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences this section shall not apply to -

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for -

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based

upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than

one school, college, or department which are administratively separate units, such term means each such school, college, or department.

[1] This is the Oral Argument of Brown University.

THE CLERK: THE next case today is Amy Colon, et el, vs. Abigail Walsh, et al, Appeal No. 21-1032.

* * *

[2] THE MALE JUDGE: No, it does not. Counsel, you said that in your brief and that's simply not so. What Rule 23E requires is that the District Court consider the adequacy of representation. It doesn't require an explicit finding. And the question of adequacy was broached in the District Court in this instance, and there is no reason, I suggest, to assume that Judge McConnell didn't consider it as his role which the rule requires him to do. We approved [3] in a lot of different contexts implicit findings before, but there's no express finding required.

* * *

THE MALE JUDGE: But there's no reason to believe that the class representatives here who have served in that capacity for decades at this point. I mean on what basis do you claim that they are inadequate?

* * *

THE MALE JUDGE: Well, not at the time that they served. They had been serving. They had been serving since the class was first certified. There was no motion made in the [4] District Court to decertify the class that I could find. Did you make such a motion?

* * *

THE MALE JUDGE: When I say "you," I mean on behalf of the parties that you represent. There is no such motion. So the question is: Is there some reaon to believe, apart from your dissatisfaction with the settlement as a whole, and that would wash out when we determine whether the settlement was fair, adequate, and reasonable. Is there some reason to believe that these class representatives were not doing the job that the District Court appointed them to do?

* * *

[5] THE MALE JUDGE: It goes to whether the class representatives can be trusted?

* * *

[6] THE MALE JUDGE: I understand that they are no longer undergraduates at Brown, right? But there's got to be some reason beyond that why their representation isn't adequate, because both [7] this Court and the Supreme Court have said that you don't have to continually, you know, be subject to whatever the institutional program is in order to continue as a class representative. The Supreme Court said that in Sosna and Iowa. We said it in Ross. So there's got to be some reason that you think these class representatives aren't doing the job.

* * *

[8] THE FEMALE JUDGE:

* * *

So could you just -- I know I'm shifting your argument, but can you please tell us why we would find the terms of the settlement for these of the particular women you represent [9] to be unfair and inadequate? Thank you.

MR. BONSIGNORE:

* * *

[10] It also treats the class members, the absent class members, unfairly because it's inequitable. They are treated inequitable relative to each other in violation of Federal Rule of Civil Procedure 23E.

* * *

[13] MR. BONSIGNORE: I think that that's the point, Your Honor. At this time, they upended a settlement that benefited an entire group of absent class members and they inserted preferences that pit one female athlete against another. They pitted one class member against another --

THE FEMALE JUDGE: Okay.

MR. BONSIGNORE: Via the new settlement agreement. That's a -- that's an error, as a matter of law. That's not what a --

THE MALE JUDGE: You know you can say that, but no member of any of the teams that you say were disadvantaged has joined as an objector. The objectors here are all members, as I understand it, of the hockey or gymnastic teams either which were affected adversely by the settlement. Indeed they were

benefited by the settlement because those teams were locked in by the settlement.

* * *

[25] MR. BONSIGNORE: The analysis where counsel points to for the class representatives -- the objectors rather and points to the few, it is not consistent with the law. The duty, the fiduciary duty of the Court and the fiduciary duty of the class representatives places a burden on them that is not on absent class members some of whom are not aware.

I'm not sure how people who were entering Brown that would graduate 2024 and beyond would even know about what's going on now. They wouldn't. That's why the duty of the Court in a class action setting is so far and above that in a regular settlement that it's incorporated in Supreme Court law.

* * *

[26] MR. BONSIGNORE: It's difficult to understand how the class representatives, none of whom were Sprint customers at the time the settlement agreement was executed, had the interest much less incentive to stop Sprint from enforcing the flat rate against its customers.

I'd also point the Court to Phillips Petroleum Co. v. Shutts, 472 U.S., 787 [sic] 797 on page 812. The due process clause, of course, requires that the named plaintiff at all times adequately represent the interest of the absent class members. And that's cited Hanesberry v. Lee. And this circuit has also made clear that

the District Court had a continuing duty to assure adequate representation in Key vs. Gillette, 782 F.2d 5 at page 7.

* * *